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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 209.

ISAAC TAYLOR AND SALLIE A. HOWES, APPELLANTS,

vs.

MOSES L. HOLMES, REUBEN J. HOLMES, EPHRAIM MANNEY AND VALENTINE MANNEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FILED MARCH 3, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 13, 1887.

1 UNITED STATES OF AMERICA,
Western District of North Carolina:

Circuit Court, 4th Circuit, at Statesville, N. C.

Be it remembered that on the 17th day of March, A. D. 1882, Isaac Taylor, of the city of Boston, & a citizen of the State of Massachusetts, and Sally A. Howes, of the city of Hoboken, & a citizen of the State of New Jersey, by their solicitor, David M. Furches, filed their bill in the office of our court of equity, in the circuit court of the United States for the western district of North Carolina, against Moses L. Holmes, Reuben J. Holmes, Ephriam Manney, and Valentine Manney, all citizens of said district and State of North Carolina, which said bill is in the words & figures as follows, to wit:

Circuit Court of the United States for the Western District of North Carolina, in the Fourth Circuit. In Equity.

To the judges of the circuit court of the United States for the western district of North Carolina, in the fourth circuit:

2 Isaac Taylor, of the city of Boston, in the State of Massachusetts, and Sallie A. Howes, of the city of Hoboken, a citizen of the State of New Jersey, for themselves individually, each as a holder and owner of shares of the capital stock of the Gold Hill Mining Company hereinafter mentioned, as well as for and in behalf of all other stockholders of the said company who may desire hereafter to unite with them herein, bring this their bill against Moses L. Holmes and Reuben J. Holmes, of Salisbury, and Ephriam Manney, of Gold Hill, and Valentine Manney, of Milledgeville, each a citizen of the State of North Carolina.

And thereupon your orators complain & say that they are principal owners & holders of stock in the Gold Hill Mining Company, to wit, of nearly three-fourths of all the shares of its capital stock ever issued by it, and that the said company was duly incorporated under the laws of the State of New York for the purpose of conducting the business of mining at Gold Hill, in the county of Rowan and State of North Carolina, by a proper signing of its certificate of

3 association for such such purpose, due acknowledgement thereof on the 30th day of August, 1853, and the immediate filing of the same in the office of the clerk of the city and county of New York and a duplicate thereof in the office of the secretary of state of the State of New York, which certificate set forth that its capital stock was fixed at $1,000,000, the number of shares being 2,000,000 at the par value of $5 each, its term of existence twenty-five years, its principle office being in the city of New York, the trustees named in its certificate of incorporation to manage its concerns being seven in number, all citizens of such State, except the defendant, Moses L. Holmes, one of them, to wit, Isaac H. Smith, being designated in the first elections of its officers as president of its board of directors, who continued by successive elections to hold such office until his death, in the fall of 1858; all of which matters

pertaining to such due incorporation will appear by chapter 40 of the laws of New York for 1808, and by the act amending the same, to wit, chapter 333 of the laws of 1853, and by certified copies of such certificate and its duplicate so filed, which your orators beg leave to produce to this honorable court whenever thereunto required.

4 That on the said 30th day of August and prior to signing of such certificates the said Moses L. did, in writing, offer to sell to three of those named in such certificate as trustees, and to another, one Maxwell, a citizen of said State, all the estates, mines, fixtures, & property set forth in a schedule to said offer attached, on the following terms and conditions, to wit: That on their receiving certain leases described in such schedule, and on the delivery to them of the personal property therein mentioned, they were to pay him the sum of $60,000, and on September 20th then next, upon receipt by them of the deeds of all the estates specified in said schedule, conveying the same by unquestionable titles to them or their assigns, same incumbrances to be created by him in the sum of $125,000, payable to the original owners of said estates in four to six months, and to be assumed so to be paid by them or their assigns, they were to pay him the further sum of $91,000 and to deliver to him 30,000 shares of the capital stock of the said Gold Hill Mining Company, then to be formed as above stated, it being further stipulated that 50,000 additional shares thereof should be reserved in the treasury of the company to provide for the payment of the said

5 amount of incumbrances, the true intent of which offer was that on the filing of the said certificate the said offer should inure to the benefit of the company.

Whereafter, and on Sept. 1st, 1853, in furtherance of said intent, the said Moses L. did, in writing, agree to and with said company to sell and convey, on the terms aforesaid, twelve certain pieces & tracts of land at or near said Gold Hill, leases thereof and mineral interests thereon, with steam-engines, pumps, tools, & other fixtures and personal property thereto belonging & thereon being, and with certain reservations of a lot of two acres and the "sands" collected up to the time of deliveries of possession, and as to the 12th numbered parcel, of which the said Moses L. had then no bond from, but only the word of, one Dr. E. B. Rice, its owner, but was to use his influence to procure such title immediately on his return home, as all of the above-recited matters will more fully appear from the two said several writings, interchangeable, executed, & delivered, now in the possession of your orators, which they are ready to produce to this honorable court whenever thereto required; that, as it

6 subsequently appeared, the said defendant, Reuben J., a brother of the said Moses L., and also the said defendant, Ephriam Manney, and his brother Valentine were interested in the said agreement and in the ownership of the said real & personal property with the said Moses L., and then, on the performance by the company of the conditions of payment by it to be performed at the time of the delivery to it of the deed of said real & personal property, which, with the previous payment made of $60,000,

was stipulated & fixed at the gross amount of $299,500, & for that amount, as the considerations paid by the said company and so expressed in the deed dated, signed, & sealed by them on October 4th, 1853, they undertook and pretented by the said deed to perform their part & obligation under the said agreement, the said deed making the president and directors of the said company the party thereto of the second part & grantee of the said property thereunder, and while it purported to convey the said property by these expressed words, "absolutely in fee simple," did in fact convey the same without any or proper words of inheritance or of power of assignment, & while it contained a covenant of
7 warranty of title contained no covenant of a clear title, and did not express the condition in the said offer and agreement that the tenure thereunder was subject to the incumbrances to the extent of $125,000, as provided in said offer, the payment of which was to be assumed by the said company, which deed purported to convey six several tracts of land, a mineral interest in one of them and two leasehold mineral interests in other of said tracts, with certain personal property, to wit: 1, the "Heilig gold mine tract" of 100 acres; 2, the "Earnhardt gold mine tract," stated in said offer to contain 90 acres; 3, the "old-field lot," estimated at 10 acres; 4, the "mineral interest," below fifteen feet from the surface of the "ten-acre lot," together with the superficies not thereto granted; 5, the "leasehold interest" of ten years from April 5th, 1853, of the "Honeycut mines;" 6, the "Paul Beaver tract" of 104 acres, adjoining the "Heilig;" 7, the More Beaver tract" of 72 acres, adjoining No. 6; 8, the "Hewey Peeter tract" of 88 acres; 9, the "leasehold interest" of Holmes, Worth & Co. in No. 2, and sixteen head of horses on Nos. 1 & 5, together with all buildings, mills, engines, boilers, & other machinery & apparatus for mining on the said lands, but with certain reservations of lots, washed sands, minerals over and
8 metals from or and out of said lands, as set forth in the said deed, now in the possession of your orators and ready to be produced whenever thereunto required by this honorable court; that the said deed was not then or at any time thereafter duly delivered by the said grantors, but was required by them to be placed in escrow, and to such end deposited with one Burton Craige, Esq., who drew the same, to be thereafter delivered by him to the said grantees on the payment by the company of the said incumbrances so to be created by the said Moses L., as aforesaid, as the same will more fully appear by the certificate thereof written at the foot of said deed by the said Craige, who thereafter, and upon the payment by the said company of the said amount of incumbrances, which was in full performance of its undertaking & in full payment of the price agreed on, instead of them delivering the said deed, drew up, as minuted also by him in said certificate, a full covenant warranty deed, which was executed by the same grantors of the same tracts of land, mineral interest, & chattels, as set forth in the said deed put in escrow, and only for the same expressed considerations, to the said Isaac H. Smith, his successors and assigns, which deed was dated July 9th, 1855, and

9 delivered to the said Smith its *habendum* clause, also containing the words following: "In trust, nevertheless, that the said party of the second part shall stand seized and possessed of the premises hereby conveyed to the only proper use & behoof of the Gold Hill Mining Company, a body politic, organized & chartered by the acts of the Legislature of New York, and in trust to apply all the incomes & profits of said premises to the use of the said Gold Hill Mining Company and convey the same to whomsoever the said Gold Hill Mining Company may designate & appoint," the said deed being registered in the office of register of deeds in & for the said county of Rowan, in Book No. 40, at page 432, as by the said Book of Register, or a duly certified copy of the said deed now in the possession of your orators will more fully appear, & to which they beg leave to refer when thereto required by this honorable court, for the especial reason that the said deed was kept by the said Smith and is beyond the reach of your orators or any their knowledge of its whereabouts, the said Smith having never, up to the time of his death, by any proper deed of conveyance or release conveyed the said real, personal property or any of it to the said company
10 or any person or persons; that the said company purchased and entered under title on divers other tracts of land at and near Gold Hill aforesaid, and in Cabarrus county adjoining said county of Rowan, and expended large sums of money in the same as well as in improvements on its said lands at Gold Hill, of which it had possession under said offer and agreement, as also in the purchase of machinery in & for its prosecution of its business of mining ores and extracting gold therefrom, and duly appointed the said Moses L., then one of its trustees, and the said Valentine as the superintendents of said mines, property, and mining operations, who, in the year 1855, claimed that they had made false returns of the proceeds of said mines in the interest of the said company, & in expectation of the reimbursement from the future yield of the mines, and demanded of its board repayment of such advances, and to such end that the said board, without due convention or consent of its stockholders, as your orators are informed, verily believe, & therefore charge, applied for and obtained the passage of a special act of the Legislature of New York, known as chapter 298 of the laws of 1855, under which they assessed the stock of the said company and
11 from the proceeds of such assessment paid such demands of the the said Moses L. and Ephriam to an amount of about $20,000, whereafter the said Reuben J. was elected a trustee in the place of the said Moses L., which office he claimed to hold in the absence of any one elected as his successor until he transferred his stock, or pretended so to do, by and through one Gelston, on or about December 15th, 1860, to the said Moses L., and he, with the said defendant, Ephriam, were, in said year 1855, appointed superintendents of said mining property, until they were removed by the said board, the said Ephraim in July and the said Reuben J. in December, 1860, the returns from the said mines having greatly dwindled during their superintendence and the company becoming indebted in a sum exceeding $40,000; that although the said Reuben J. and his asso-

ciate grantors in said deed to Smith well knew that therein no estate of inheritance was granted and that after his death, in 1858, they thereby held as remainder men in fee simple all the said property, real & personal, deeded by them to him, and further as the bargainers with the said company in and under said offer and agreement and their said deed of Oct. 4th, 1853, were charged with the trust of holding and conveying the same for & to it, they
12 not only refused and neglected so to hold or convey said property, but proceeded to enter upon the same, drive off therefrom its agents and servants by threats & armed violence, and also to seize, occupy, & possess the same and took the rents, issues, and profits to their own use, and sold a valuable steam-engine, boilers, & machinery therewith connected, which cost the said company the sum of $9,673.05, and which they seized while *in transitu*, to wit, at Salisbury, in said Rowan county, and further seized & entered on divers other parcels of the real estate of the said company at or near Gold Hill & pretending that they had acquired to the whole of its real estate & property thereto attached, a good & perfect title—have made certain pretended sales and deeds of the same and received mortgages thereof, which have been registered in the said office of register in & for said county of Rowan, whereby a cloud has been thrown on the just title of said company, and have otherwise so falsely & fraud-ently operated and contrived, permitted & suffered, other pretended sales and deeds of conveyance and other mortgages thereunder to be made, executed, & registered as aforesaid, so further clouding said title; and, further, that on a forclosure sale of the said property under one of the said mortgages the
13 said Moses L. and Reuben J. claimed to have been innocent purchases thereof and to hold the same by a perfect and indefeasible title, under which the said Moses L. & Reuben J. have negotiated a further sale thereof to persons unknown to your orators and now intend & threaten to convey the same to a foreign corporation organized under the laws of the Kingdom of Great Britain and Ireland.

And your orators further show unto your honors that the said company, under the said offer and agreement and the deeds hereinbefore set forth, entered upon the said real property above stated & took possession of the said personal property and worked, used, and occupied the same as the property of the said company by its officers and agents until in the year 1861, when or about the 10th day of July they were driven off by the defendants, as above set forth; that thereafter, by the death and resignation of its officers & directors or the greater part thereof, it became utterly disorganized, never having held any meetings of its directors or stockholders since the year 1862, so that at this time there is but one director of the said corporation now living & surviving, to the knowledge of your orators, and
14 that he, by his acts and doings and connections with the defendants in and touching the pretended claim or claims as above mentioned adversely to the interest of the said corportion and its stockholders and creditors, has rendered himself incompetant to assert & protect the rights of the said corporation and of your orators,

and has refused & neglected and still refuses and neglects so to assert and protect the same.

And your orators further show unto your honors that all the defendants named in the caption of this bill are citizens of the State of North Carolina and with the real property mentioned herein within the jurisdiction of this honorable court; that your orator is a citizen of the State of Massachusetts, and your oratrix, who was married in the year 1864 and still remains under the disability of coverture, is a citizen of the State of New Jersey; that they have not made the said surviving director a defendant herein for the reason that — such his joinder would oust its jurisdiction as to the parties before it, as well as on the grounds, above stated, of his incompetency to serve as and his actual abandonment of the duties of such officer, and also have not made the stockholders other than your orators parties hereto, because they & their places of residence are, to a large
15 extent, unknown to your orators, and, further, because they — holding stock in small amounts and are too numerous to be brought under such jurisdiction; neither have they made the said company a party defendant, because, as for as its place of business, fixed by its certificate of incorporation, is concerned, it is outside the said jurisdiction, and for the further reason that it has no directors or officers competant to represent the same.

But now so it is, may it please your honors, that the said Moses L., Reuben J., Ephraim, & Valentine, combining & confederating with divers persons, as has in part been stated, and with divers other persons at present unknown to your orators, whose names when discovered your orators pray they may be at liberty to insert herein, with apt words to charge them as parties defendants hereto, and contriving how to wrong & injure the said Gold Hill Mining Company & your orators and others as stockholders and creditors thereof, the said Moses L., Reuben J., Ephriam, & Valentine have refused and neglected to execute and deliver a proper deed of such part, as first above stated, of the said mining property to the said Gold Hill Mining Company as on or prior to October 4th, 1853, they
16 agreed so as aforesaid to do, and have, since the tenth day of July, 1861, or thereabouts, debarred the said company, its officers or agents, from the possession, occupancy, and enjoyments of the whole of its said mining and personal property at Gold Hill aforesaid, and of the rents, issues, profits, & other emoluments to be derived therefrom, and have received large amounts thereof to their own joint or several use therefrom, and also on sale by them under pretended right to the said property, for which they have wholly neglected to render any account to the said company or any one in its behalf, and have damaged the said property, both real & personal, in a large amount, and now refuse either to pay the value of the said personal property so rendered worthless or converted to their own use or to restore the possession of the mining property with mill-houses, engines, and other machinery attached thereto, and to execute and deliver a good and sufficient deed of the said mining property occupied, seized, & held by them since said July 10th, 1861, and have, besides refusing as above to execute and deliver a deed

for so much thereof as was agreed to be executed & delivered by them to the said company on said 4th day of October, 1853, also refused to execute in lieu thereof or otherwise the trust devolved on them as bargainers with it
17 after the death of the said Smith, in the fall of 1858, and also, since their taking possession of other parcels of land of said company purchased by and conveyed to it of and by others than the said bargainers, have wholly neglected & refused to reconvey to it the same parcels or any part thereof, and have agreed and now threaten to execute and deliver a deed of its said mining property at Gold Hill to a foreign company as aforesaid or to some other person or persons in its behalf; and the defendants, the said Moses L., Reuben J., Ephriam, & Valentine, besides other allegations and pretences in excusing and defending the acts done & wrongs perpetrated against the rights of the said Gold Hill Mining Company by them or those acting in concert with them, as more particularly hereinbefore set forth, in & touching the said first-mentioned deed of Oct. 4th, 1853, alledge & pretend that they executed a proper deed to the said Good Hill Mining Company and had lawful right to require or consent to the placing of said deed in escrow; whereas your orators, besides what they have heretofore alleged and charged as true in fact & law, charge the contrary thereof to be the truth, to wit, that no proper deed to it was executed, & that
18 inasmuch as the acts, covenants, and conditions to be performed by the said Gold Hill Mining Company under its agreement aforesaid relating to the purchase of the property described therein and payments to be made thereunder had been by it done, performed, & made the said company was entitled to an immediate delivery of the proper deed to it, having passed no resolution or done other acts waiving or authorizing the manner of such delivery; and the said defendants in excusing & defending as aforesaid, further allege & pretend that after the conditions made and executed by them in and touching the placing of said deed in escrow they thereafter had the right to execute and deliver in the stead of the one so placed in escrow the deed to said Smith, as above set forth, and to set aside the former, as has been stated; whereas your orators charge the contrary thereof, and that as matter of right, the said conditions of escrow having been fulfilled, the said deed of 1853 was wholly relieved therefrom and immediately took effect as a deed to be by them thereafter amended and made a proper deed as aforesaid, and that no agreement or understanding to the contrary thereof between them and the said Smith tended in any way to jus-
19 tify their said acts of substituting for it their deed to him, he not having produced to them a duly authenticated copy of a resolution of the board of directors of said company to such effect, and if he had, then not unless he, with them, duly caused a minute of the same to be made by the said Craige either in his entry at the foots of the first deed or by way of recital in the second or by due filing of the same in the register's office aforesaid. To the end, therefore, that the said defendants may, if they can, show why your

orators may not have the relief hereby prayed, and may, upon their several and respective corporal oaths and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered & set forth as by the note hereunder they are respectively required to answer—that it is to say—

1. Whether the said Moses L. Holmes did not, on August 30th, 1853, by an agreement in writing & in contemplation of the due formation under the laws of the State of New York of the corporation to be known as the Gold Hill Mining Company, agree
20 to sell to A. M. Sacket, Jno. D. Maxwell, Henry W. Belcher, and Samuel Smith, the three latter being trustees as aforesaid, of the city of New York, divers estates, mines, fixtures, and property at Gold Hill, in the county of Rowan and State of North Carolina, as described & set forth in a schedule annexed to such agreement, substantially on the terms & conditions hereinbefore first stated, and particularly whether it was not therein provided that on the second payment by them or their assigns of the sum of $91,000 they or their assigns were to receive deeds of all the estates mentioned in said schedule and conveying unquestionable titles thereof to them or their assigns, and if in any particular he did not so agree to set forth the same.

2. Whether, on September 1st, 1853, he did not, in pursuance of & furtherance of such his agreement of the preceding 30th day of August and at New York city, agree with the said Gold Hill Mining Company to sell to it divers tracts of land, leases, mineral rights, numbered from 1 to 12, with divers steam engines and other personal property included under & with said leases; that one, numbered 12, being set forth in the following words: "Dr. E. B.
21 Rice's land, adjoining the Heilig gold mine on the west, containing some 14 or 16 acres, a number of leases given to build house on, I do not bind myself to convey, as I have no bond from him to make a title, only his word. I will use my influence to procure the title as soon as I get home." The total acres to be conveyed in fee, exclusive of said Rice's land, being 517, or if that be not the exact number, then to state what such total acreage in fee actually was.

3. Whether the said Moses L. did not represent to those named in the first interrogatory and again to the directors or trustees of the said company or some of them that he had lawful and valid authority, under agreement in writing, as to the said lands in fee other than said Rice's land, and all requisite power as to said leases, with the personal property included, severally in each of them as so numbered and described by him, to contract with the said company for their sale by him to it, and, if not, to state particularly in what several particulars he represented such authority and power to be deficient.

4. Whether, on the fourth day of October, 1853, at the time he & his brother, Reuben J., together with the aforesaid Ephraim & Valentine, signed and executed the deed to the president and directors

of the said Gold Hill Mining Company, he or they or any of
22 them had full & perfect titles to the said lands in such deed specified, and also to the said leases, mineral rights, & personal property therein also mentioned and described, and, if not, in what particulars such titles were defective.

5. Whether it was not the true intent and understanding, as well on the part of the grantors of the said last-mentioned deed as of the party or parties then acting for the said company and receiving and accepting the delivery of the same before it was placed in escrow, to wit, in the hands of Burton Craige, Esq., who drew it up, that the said deed should convey the title to the property and the grantees therein named in fee simple in trust for and to enure to the benefit & behoof only of the said company, and as if the said company by its proper name and title had been made the party of the second part therein, & whether the said grantors did not, on the day of the execution & delivery as aforesaid of the said deed, receive the full amount payable as to the offer and agreement aforesaid in the 1st & 2nd interrogatories mentioned in cash and stock of the said company, to wit, the sum of $91,000 and 30,000 shares of said stock and its par value of $5 for each share, which, with the amount of $60,000 previously paid in cash, was agreed & accepted as
23 the amount of the consideration expressed in said deed and as in full performance by the said company of its obligations as the assignee of the said persons and under the said offer mentioned in the said 1st interrogatory.

6. Whether the grantors in the deed by them to the said Isaac H. Smith, dated July 9th, 1855, intended in and by the same merely to convey to him a life estate in trust for the said company, as expressed therein, or believed that they had conveyed or intended to convey to him a good & indefeasible estate in fee simple in trust as aforesaid, & whether they had not prior to such day, to wit, on or before the 4th day of October, 1853, received the full amount of the consideration expressed in such deed of 1855.

7. Whether, at or prior to said July 9th, 1855, said Gold Hill Mining Company had not fully paid and discharged the amount of $125,000 as named in the said offer of August 30th, 1853, of the said Moses L., and interest due thereon, if any, being the amount of incumbrances specified in said offer as to be placed on the property and assumed to be paid by the persons therein mentioned or their assigns, the said company, and, if not, then at what time the said amount was paid and said incumbrances discharged, or
24 whether, by reason of the failure of Peter & Jacob Earnhardt to execute and deliver a deed to the said grantors (in said deed of July 9th, 1855) prior to July 5th 1855, or any other time of all or of some portions of the lands conveyed by said grantors, any incumbrances were placed by the said Moses L. thereon, or, if any, to state what they were.

8. Whether the said Moses L. Holmes and the said defendant, Valentine Manney, did not represent at some time in the year 1855 to the board of directors of the said company or some of them that prior thereto and while acting as superintendents duly appointed

by it as such of its said mining property they had made false returns of the proceeds of the mines therein and claimed that they had made such returns in the interest of the said company, and also so made the same in expectation of reimbursing themselves in some way from the future yield of the mine or of being reimbursed by it for the advances made by them under such return, & whether they did not then & there demand of it the repayment of such advances and subsequently receive from it or its proper fiscal officers a large amount, and, if so, state the same and the several parts thereof
25 so received by the said Moses L. & the said Valentine.

9. Whether the said Reuben J. and said Ephriam or either of them, naming which, did not, on and after July 10th, 1861, take possession of the said mines and of large amounts of quicksilver and divers kegs of gunpowder; and, if so, state the number of lbs. of quicksilver and of kegs and the then value of said quicksilver & gunpowder, and commence to extract gold from the ores of said mine, & thereafter, to wit, on and after January 6th, 1862, they or either — them did not, in connection with the said Moses L., assume control as & for themselves of the whole of the said mining and personal property at Gold Hill, N. C., and continue to extract gold from said ores and also therefrom large quantities of blue vitriol, which they so sold to or for the use of the so-called confederate government at a large price; and, if so, to name the price per lb. and the total number of pounds so made or so sold.

And also that the defendants, on like oath & like measure of knowledge, remembrance, information, and belief, like answer make to all & singular the matter aforesaid, & that as fully & particularly as if the same were here repeated and they severally distinctly interrogated thereto.

26 Wherefore your orators pray that a decree may be made by your honors that the said Moses L., Reuben J., Ephriam, & Valentine execute a proper deed, with covenants of warrants and of title, free from all incumbrances, of all & singular the said tracts of land, mineral interests, leases, and property attached thereto as the same are specified in their said deed of October 4th, 1853, with the exception of the parcel indicated by the number 5 and mentioned therein as the right, title, and interest of the grantors in the Honeycut mine, and also the property attached to said tracts, mineral interests, & leases so to be conveyed which has been replaced by other like property and now so attached and inclusive of such like & so attached property, and also execute and convey by like or in the same property deed all those other tracts of land part & parcel of the said mineral property at Gold Hill aforesaid which were taken possession of and occupied by them as aforesaid to such person or persons as shall be appointed by this honorable court to receive and hold in trust the said deed or deeds as hereinafter mentioned, and also that the said Moses L., Reuben J., Ephriam, & Valentine shall render within such time as shall be named by this honorable court a just, full, & true
27 and perfect account of all monies received by them or either of them as and for the rents, issues, profits, and emoluments from the said real & personal property and from the sale of property,

whether chattels or ores, taken out of the mines aforesaid, and especially of the sale made of the said steam engines and machinery seized *in transitu* at Salisbury as aforesaid, and in such account charge themselves with the cost as aforesaid of the same; and also that it may please your honors to appoint a suitable person as trustee of your orators and other stockholders and creditors of the said Gold Hill Mining Company, to be named as the grantee in the aforesaid deed or deeds, to hold the property therein and thereby to be conveyed and the rents, issues, & profits thereof for the benefit of all such stockholders and creditors until the further order and direction of this honorable court.

And that your orators may have such further or other relief in the premises as the nature or the circumstances of the case may require and to this honorable court shall seem meet.

And may it please your honors to grant unto your orators
28 a writ of subpœna of the United States of America issuing out of and under the seal of this honorable court, directed to the said Moses L. Holmes, Reuben J. Holmes, Ephriam Manney, and Valentine Manney, commanding them on a day certain therein to be named and under a certain penalty to be and appear in this honorable court, then & there to answer all and singular the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

D. M. FURCHES,
A. B. CONGER,
Sol's and of Counsel for Pl't'fs.

And on the same day, to wit, March 17th, 1882, the plaintiffs file a bond for costs in the words & figures as follows, to wit:

Circuit Court United States, Statesville, N. C. In Equity.

ISAAC TAYLOR & Another *vs.* MOSES L. HOLMES & Others.

We, the undersigned, promise and agree to pay unto Moses L. Holmes, Reuben J. Holmes, Ephriam Manney, and Valentine Manney the sum of two hundred dollars.

Witness this the 17th day of March, 1882.

29 But the above undertaking to be void upon condition that the above-named plaintiffs successfully prosecute their suit to judgment, or on failing so to do shall pay such costs as may be adjudged against the above-named defendants therein.

A. B. CONGER.
D. M. FURCHES.

Witness:
A. D. COWLES, *D. C.*

And thereupon, at the request and by the direction of the said complainants, Isaac Taylor and Sallie A. Howes, by their solicitor aforesaid, and on same day, to wit, March 17th, 1882, writs of subpœna are issued in pursuance of the prayer of the said bill of com-

plaint against the said defendants, returnable on the 1st Monday in May, 1882, which said writs of subpœna are in the following words and figures, to wit:

UNITED STATES OF AMERICA, } ss:
Western District of North Carolina, }

The United States of America to Moses L. Holmes and Reuben J. Holmes, of Salisbury, N. C., & Ephriam Manney, of Gold Hill, N. C., & Valentine Manney, of Milledgeville, N. C.

We command you and every one of you that you appear before the judges of our circuit court of the United States of Amer-
30 ica for the western district of North Carolina, at the office of the clerk of the said court, in the town of Statesville, in said district, on the first Monday in the month of May next, to answer the bill of complaint of Isaac Taylor, of Boston, Mass., and Sallie A. Howes, of Hoboken, N. J., filed in the clerk's office of said court, in said town of Statesville, then & there to receive and abide by such judgment and decree as shall then or thereafter be made upon pain of judgment being pronounced against you by default.

To the marshal of the western district of North Carolina to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Statesville, in said district, the 17th day of March, 1882, and in the one hundred & sixth year of the Independence of the United States.

[SEAL.] H. C. COWLES, *Clerk.*

MEMORANDUM.—The within-named defendants are notified that unless they enter their appearance in the clerk's office of said circuit court at Statesville aforesaid on or before the day to which the within writ is returnable the complaint will be taken against them as confessed and a decree entered accordingly.

H. C. COWLES, *Clerk.*

31 And on the return day of said writs, to wit, the first Monday in May, 1882, the same being rule day and the first day of said month, at the clerk's office of this court, the marshall makes return that he has executed the said writs by delivering a true copy thereof to the said Moses L. Holmes, Reuben J. Holmes, and Ephriam Manney on April 14th, 1882, and to the said Valentine Manney on April 29th, 1882, and on the said rule day the defendants, through their solicitor, J. M. McCorkle, file their demurrer to the bill of complaint in the words and figures as follows, to wit:

Circuit Court of the United States for the Western District of North Carolina, in the Fourth Circuit. In Equity.

ISAAC TAYLOR and SALLIE A. HOWES
vs.
MOSES L. HOLMES, REUBEN J. HOLMES, EPHRIAM MANNEY, and VALENTINE MANNEY.

The demurrer of Moses L. Holmes, Reuben J. Holmes, Ephriam Manney, and Valentine Manney to the bill of complaint of Isaac Taylor and Sallie A. Howes.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the
32 said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto and for cause of demurrer say that it appears by the said complainants' own showing by their said bill of complaint that the said complainants are not entitled to the discovery or relief prayed by their said bill against these defendants. Wherefore and for divers other good causes of demurrer appearing in the said bill of complaint these defendants do demur to the said bill and to all the matters and things therein contained, and humbly pray the judgment of this honorable court whether they shall be compelled to make any or other answer to the said bill, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

I certify that, in my opinion, the foregoing demurrer of Moses L. Holmes, Reuben J. Holmes, Ephriam Manney, and Valentine Manney, defendants to the bill of complaint of Isaac Taylor and Sallie A. Howes, complainants, is well founded in law and proper to be filed in the above cause.

J. M. McCORKLE,
Solicitor and of Counsel for Defendants.

UNITED STATES OF AMERICA.

Circuit Court of the United States for the Western District of North Carolina, in the Fourth Circuit.

33 Moses L. Holmes, Reuben J. Holmes, Ephriam Manney, and Valentine Manney, each being duly sworn, do depose and say that they have each read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

M. L. HOLMES.
R. J. HOLMES.
EPHRIAM MANNEY.
VALENTINE MANNEY.

Sworn & subscribed before me this 27th day of April, 1882.
[SEAL.] J. M. HORAH,
Clerk Superior Court, Rowan County.

And afterwards, to wit, June 5th, 1882, the same being the first Monday and rule day in said month, at the clerk's office of this court, the cause is set down for hearing.

And afterwards, to wit, at a regular term of the said circuit court, held on the third Monday in October, A. D. 1882, in the town of Statesville—Hon. Rob't P. Dick, judge of the United States district court, judge presiding—the plaintiffs, through D. M. Furches, one of their solicitors, filed their joinder in demurrer in the words and figures as follows, to wit:

Circuit Court of the United States for the Western District N. C., at Statesville, N. C.

ISAAC TAYLOR and Another *vs.* MOSES L. HOLMES & Others.

34 *Plaintiffs' Joinder in Demurrer.*

And the said plaintiffs say that their bill and the matters therein contained in manner and form as the same are therein set forth are sufficient in equity for them, the said plaintiffs, to have and maintain their said suit against the said defendants, and the said plaintiffs are ready to verify and to prove the same as the court here shall direct and award; wherefore, inasmuch as the said defendants have not answered the said bill nor hitherto in any way denied the same, the said plaintiffs pray judgment and their damage by reason of the defendants not performing the said several promises and undertakings in the said bill mentioned, &c.

A. B. CONGER AND
D. M. FURCHES,
Sol's for Pl't'fs.

And at the said term, to wit, October term, 1882, the cause is argued and continued to an adjourned term of this court to be held on the first Monday in February, A. D. 1883.

And afterwards, to wit, on Feb'y 5th, 1883, the same being the first Monday in said month and the time designated for the holding of the adjourned term of this court, an order is received and filed in the words and figures as follows, to wit:

35 OFFICE OF U. S. DISTRICT JUDGE,
WESTERN DISTRICT OF NORTH CAROLINA,
GREENSBORO', *Jan'y 16th*, 1883.

ROB'T P. DICK, judge:

It is ordered that H. C. Cowles, clerk of the U. S. circuit court at Statesville, open said court at the adjourned term on the first Monday in February next. At the opening of the court he will file the opinion of the judge in the case of Taylor *et al. vs.* Holmes *et al.*, in equity. He will receive the decree proposed by defendants' counsel and forward the same to me for signature. He will enter of

record any motion for an appeal to the U. S. Supreme Court and that the same is allowed. Bond for costs in the sum of two hundred dollars will be required. The clerk will adjourn the term until the following Saturday, Feb'y 10th, for the purpose of filing signed decree and disposing of motions that may be made and perfecting proceedings for appeal. The court will then be adjourned *sine die* unless otherwise ordered by the judge.

ROB'T P. DICK, *Judge.*

Thereupon and in pursuance of the authority contained and conferred in the above order H. C. Cowles, clerk of the said court, opens the said court at the said time, to wit, on the first Monday in Feb'y, 1883, the same being the 5th day of said month, with the
36 usual proclamations.

Whereupon the complainants, through A. M. Furches, one of their solicitors, moved for & file amendments to their original bill in the words and figures as follows, to wit:

The following *is* amendments proposed and, upon motions of plaintiffs, asked to be allowed by the court at the adjourned session of the circuit court of the United States for the western district of North Carolina, at Statesville, on Monday, the 5th day of February, 1883, to the bill of complaint of Isaac Taylor and another against Moses L. Holmes and others:

1. On page 1st, line 11, after the name Howes and before the word "of," to insert the following, to wit, "wife of Amos Howes;" and on same page, 1, and in line 12, insert after the word Jersey and before the word "for," the following, to wit: Who sues by her next friend, Charles Silden, of the city of Brooklyn and State of New York," so as to make the paragraph read as follows: "Isaac Taylor, of the city of Boston, in the State of Massachusetts, and Sally A. Howes, wife of Amos Howes, of the city of Hoboken, in the State of New Jersey, who sues by her next friend, Charles Selden, of the city of Brooklyn, in the State of New York," &c., &c.

2. To insert on page 9, in line 26, between "attached" and
37 "a," to wit, "on the 28th day of August, 1876," so as to make the sentence read as follows: "And pretending that they had acquired to the whole of the real estate and property thereto attached, to wit, on the 28th day of August, 1876, a good and perfect title have been made," &c., &c.

3. To insert, on page 11, in line 7, after the word "orators" and before the word "and," the following, "the said Amos Howes," so as to make the sentence read as follows: "So that at this time there is but one director of said corporatian now living or surviving, to the knowledge of your orator, to wit, the said Amos Howes, and that *he* actings & doings," &c., &c.

4. To insert, on same page, 11, in line 25, after "1864" and before "and," the following, "to the said Amos Howes," so as to make the sentence read as follows: "Who was married in the year 1864 to the said Amos Howes, and still remains under," &c., &c.

5. To insert, on same page, 11, and in line 29, after "Jersey" and before "that," the following, "and who sues by her next friend,

Charles Seldon, a citizen of the State of New York," so as to make the sentence read as follows: "Is a citizen of the State of New Jersey, and who sues by her next friend, Charles Seldon, a citizen of the State of New York," &c., &c.

A. B. CONGER,
D. M. FURCHES,
Sol's for Plaintiffs.

38 And, at the said adjourned term of the said court, the opinion of the court is filed dismissing the bill with costs; thereupon a decree is filed in the words & figures as follows, to wit:

United States Circuit Court for the Western District of North Carolina, at Statesville. In Equity.

ISAAC TAYLOR and SALLY A. HOWES
against
MOSES L. HOLMES & Others.

This cause having come on to be heard upon the bill of complaint herein and the demurrer filed thereto in said cause, and having been argued by the counsel for the respective parties—

Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree, that the said demurrer be sustained, and that the complainants' said bill be, and the same is hereby, dismissed with costs to the defendants against the complainants and their surety, D. M. Furches, to be taxed by the clerk of this court.

ROB'T P. DICK, *Judge.*

39 And the court, in pursuance to the orders aforesaid, is adjourned by the said clerk until Saturday, February 10th, 1883.

And on Saturday, February 10th, 1883, the said circuit court of the United States, pursuant to adjournment and the orders aforesaid, is opened by H. C. Cowles, clerk thereof, and the following proceedings are had therein, to wit: The amendments proposed by plaintiffs to the original bill in this cause not having been returned by his honor, Judge R. P. Dick, to whom they were by his request sent, and there being nothing to do in said cause to-day, court is, by order of his honor, Rob't P. Dick, judge, adjourned by the said clerk until Wednesday, Feb'y 14th, 1883; and on Wednesday, February 14th, 1883, the said circuit court of the United States, pursuant to adjournment and the orders aforesaid, is opened by H. C. Cowles, clerk thereof, and an order is filed and entered of record in said cause in the words and figures as follows, to wit:

The motion for the foregoing amendments duly considered and disallowed and ordered to be entered of record at the adjourned term, on the 14th February, 1883, as of the day when motion was made.

Feb'y 12, '83.

ROB'T P. DICK, *Judge.*

And afterwards, to wit, on Jan'y 31st, 1885, the complainants, through D. M. Furches, their solicitor, file their petition and cause of appeal in the words and figures as follows, to wit:

Circuit Court of the United States for the Western District of North Carolina, in the Fourth Circuit. In Equity.

To the Honorable R. P. Dick, one of the judges of the circuit court of the United States for the western district of North Carolina, in the fourth circuit:

40 Your petitioners, Isaac Taylor and Sally A. Howes, respectfully showeth unto your honor that your petitioner, Isaac Taylor, is a resident and citizen of the city of Boston and the State of Massachusetts, and that your petitioner, Sallie A. Howes, is a resident and citizen of the city of Hoboken and the State of New Jersey; that your petitioners, the said Isaac Taylor and the said Sallie A. Howes, instituted & brought their suit in the circuit court of the United States, in the western district of North Carolina, and the fourth circuit thereof, in equity, to April term of said court, 1882, at Statesville, North Carolina, against Moses L. Holmes and Reuben J. Holmes, of Salisbury; Ephriam Manney, of Gold Hill, and Valentine Manney, of Millidgeville, all of whom are residents and citizens of the State of North Carolina; that said suit was brought for the benefit of themselves and also for the benefit of any other stockholder or creditor of the Gold Hill Mining Company; that they alleged in their bill that under the laws of the State of New York there was formed and organized a corporation in 1853, under the name and style and known as the Gold Hill Mining Company, with a capital stock of $1,000,000 *dollars*, and one

41 Isaac H. Smith was elected and chosen president of said corporation; that the principle object in forming & organizing said corporate company was to purchase, work, and operate a gold mine in Rowan county, North Carolina, called and known as Gold Hill; that at the time of said organization the defendants, Moses L. Holmes, Reuben J. Holmes, Ephriam Manney, and Valentine Manney, were the owners or principle owners of the said Gold Hill mining property, which consisted of various lots and tracts of land, steam-engines and fixtures, and some personal property, as will more fully appear from the bill itself, and at said organization Moses L. Holmes was elected one of the directors of said corporation; that at the time of said organization negotiations were begun with said Gold Hill Mining Company and the defendant, Moses L. Holmes, for the purchase of the said Gold Hill mining property, which was afterwards finally concluded by and between said corporation, on the one side, and the defendants, M. L. Holmes, R. J. Holmes, Ephriam Manney, and Valentine Manney, on the other side, and reduced to writing, the defendants stipulating to convey

42 said Gold Hill mines and mining property, consisting of twelve lots and tracts of land lying in the counties of Rowan and Cabarrus *county*, in the State of North Carolina, steam-engines & fixtures, horses, and other property for the stipulated price

of two hundred & ninety-nine thousand five hundred dollars; and on the 4th day of October, 1853, the said defendants, M. L. Holmes, Reuben J. Holmes, Ephriam Manney, and Valentine Manney, in furtherance of this contract and sale, made and executed their deed to said company, in which they in terms conveyed said property so theretofore agreed to be conveyed by them to "the president and directors of said corporation," and while said deed purported to convey said property in fee simple, using these words, "absolutely in fee simple," yet as there was no words of inheritance contained in said deed, it, in fact, only conveyed an estate in said real estate for the life of Isaac H. Smith, who was president of the corporation; that this deed was not then delivered to the said president nor to any other person for him, but was placed in escrow with one Burton Craige, Esq., who drew the same, to be held by him until the said "Gold Hill Mining Co." should pay off and discharge certain incumbrances placed upon said property, amounting
48 to the sum of one hundred & twenty-five thousand dollars, when the same was to be delivered to said company by the said Burton Craige, Esq.

That on or before the 9th day of July, 1855, said company fully paid off and discharged said incumbrances, but the said Craige did not then deliver said deed to the company, as it was stipulated and agreed he should do, but as it appears, for some reason not known to the plaintiff, the said Craige prepared another deed for the same land and property as that named and described in the deed so placed in escrow, and for the same consideration as that contained in said first written deed, and making the same parties the grantors therein, to wit, the defendants, Moses L. Holmes, Reuben J. Holmes, Ephriam Manney, and Valentine Manney, but making the grantor in said deed "Isaac H. Smith, his successors and assigns," which was delivered to the said Isaac H. Smith and was registered in the register's office of Rowan county; that in the *habendum* clause of this deed is contained the following words, to wit: "In trust, nevertheless, that the said party of the second part shall stand seized
44 and possessed of the premises hereby conveyed to the only proper use and behoof — the Gold Hill Mining Co., a body politic, organized & chartered by the acts of the Legislature of New York, and in trust to apply all the income and profits of said premises to the use of the said Gold Hill Mining Company, and to convey the same to whomsoever the said Gold Hill Mining Company may designate and appoint;" that the said Isaac H. Smith is dead, having died in the year 1858, and without ever conveying said property, by deed or otherwise; that under the said contract of sale and the deed of October, 1853, the purchaser the said Gold Hill Mining Company, by its officers and agents, took possession of said property in the fall of 1853, and continued to hold, occupy, and work the same until about the 10th of July, 1861, when the defendants, by force and threats of violence, — the agents & employees of the said company were driven off said lands and property, and, owing to the troubles of the late war, which had then commenced, said company was not able to assert its rights and to regain possession of said property until after the termina-

tion of said war, and then when said company came to asserts its
45 rights to said property it found defendants in possession of the same, claiming it as their own, alleging that they, or some of them, on some pretended claim which they had against said company for services or some other pretended cause of action, had caused proceeding in attachment to be issued against said company and levied on said property, and that the defendants purchased the same and was holding said property thereunder; but, as the deed of 1855 contained no words of inheritance, it only conveyed an estate for the life of the said Isaac H. Smith, who died in 1858, with a resulting estate in the grantors, the defendants hereinabove named, in trust for the Gold Hill Mining Company, the same was not liable to attachment & sale, but said company having bargained for and paid the defendants for the fee-simple estate therein, and said defendants being then requested to convey the fee simple in compliance & satisfaction of their contract & original undertaking, refused to do so, claiming, as is above stated, that they had become the purchasers & owners of said property by virtue of said attachment and sale aforesaid; that defendants have been in possession of
46 said property, receiving the rents and profits, ever since the 10th day of July, 1861, amounting to many thousand dollars in value; that the capital stock of the Gold Hill Mining Company was divided into 200,000 shares of the par value of 5 dollars each, and the plaintiffs are the holders & owners of a large majority of said shares of stock; that the Gold Hill Mining Company was limited by its charter to the term of twenty-five years from the date of its organization, in 1853; that, owing to the death of the president, Isaac H. Smith, and all the directors of the company except one, there has been no meeting of said corporation since 1862, when the same became disorganized for the want of officers and directors, the said directors still living refusing to act in the premises; that the plaintiff, Sallie A. Howes, was married in the year 1864, and is now, and has been ever since the date of said marriage, under the disability of coverture; that they have not made the surviving director a party def't herein for the reason that such his joinder would oust its jurisdiction; also those before
47 it, as well as for the reason that he has long since abandoned his office of director & trust- thereunder, nor have the plaintiffs made the other stockholders & creditors parties by name for the reason that their names and residences are not known to the plaintiffs, nor have the plaintiffs made the Gold Hill Mining Company a party for the reason it has no officers or organization; that plaintiffs then, after charging all manner of combinations & collusion by and between the defendants, Moses L., Reuben J., Ephriam, & Valentine, & setting out various special interrogatories as well as a general request and demand of a full answer of the matters & things mentioned and charged in their bill, pray the honorable court to make a decree commanding and compelling the said defendants to make and execute a deed in fee simple, free from all incumbrances, to such person or persons as the honorable court may appoint for such purpose, to be held by him or them in trust and

disposed of as the honorable court should by decree direct, for the benefit of your petitioners and the other stockholders & cred-
48 itors of the Gold Hill Mining Company; and that the said defendants, within such reasonable time as the honorable court should direct, be required to render a full, true, and perfect account of all the rents, profits, and issues of said property since they so wrongfully took possession thereof on the 10th day of July, 1861, and that they account for the personal property and the value thereof which so came into their possession, and for such other & further relief as in equity and justice should appear to the honorable court your petitioners were entitled to.

That to this bill of complaint of your petitioner the defendants filed a general demurrer and your petitioners joined therein; that said suit cames on for arguments upon bill, demurrer, and joinder in demurrer at October term, 1882, of said court, held at Statesville, N. C., when the honorable court took the case under advisement and adjourned the court over to a special term, on the 5th day of Feb'y, 1883.

That your petitioners at said adjourned term of the honorable court, opened & held at Statesville, N. C., on the said 5th day of February, 1883, filed their motion in writing in the following
49 words and figures, asking the amendments therein stated as follows, to wit:

"The following *is* amendments proposed and, upon motion of plaintiffs, asked to be allowed by the court at the adjourned session of the circuit court of the United States for the western district of North Carolina, at Statesville, on Monday, the 5th day of Feb'y, 1883, to the bill of complaint of Isaac Taylor & others against Moses L. Holmes and others:"

1. On page 1st, line 11, after the name "Howes" and before the word "of," to insert the following, to wit: "wife of Amos Howes;" and on same page 1st, & in line 12, insert after the word Jersey and before word for, the following, to wit: "who sues by her next friend, Charles Silden, of the city of Brooklyn and State of New York," so as to make the paragraph read as follows: "Isaac Taylor, of the city of Boston, in the State of Massachusetts, and Sallie A. Howes, wife of Amos Howes, of the city of Hoboken, in the State of New Jersey, who sues by her next friend, Charles Silden, of the city of Brooklyn, in the State of New York," &c., &c.

2. To insert, on page 9 and in line 26, between attached and a, to wit: "On the 28th day of August, 1876," so as to make the sentence read as follows: "and pretending that they had ac-
50 quired to the whole of the real estate and property thereto attached, to wit, on the 28th day of August, 1876, a good and perfect title have made," &c., &c., &c.

3. To insert, on page 11, in line 7, after the word orators and before word and, the following: "the said Amos Howes," so as to make the sentence read as follows, to wit: "So that at this time there is but one director of said corporation now living or surviving, to the knowledge of your orators, to wit, the said Amos Howes, and that *he* acting- & doing-, &c., &c.

4. To insert, on same page, 11, in line 25, after 1864 and before and, the following, to wit, "to the said Amos Howes," so as to make the sentence read as follows: "Who was married in the year 1864 to the said Amos Howes, and still remains under," &c., &c.

5. To insert, on same page, 11, and in line 27, after Jersey and before that, the following, to wit, "and who sues by her next friend, Charles Silden, a citizen of the State of New York," so as to make the sentence read as follows, to wit: "Is a citizen of the State of New Jersey, and who sues by her next friend, Charles Silden, a citizen of the State of New York."

A. B. CONGER,
D. M. FURCHES,
Sol's for Plaintiff.

51 That the court thereupon took the motion under consideration and adjourned the court until the 14th day of Feb'y, 1883, when the court filed the following order on the same sheet of paper the motions and proposed amendments were written:

"The motion for the foregoing amendments duly considered and disallowed and ordered to be entered of record at the adjourned term, on the 14th of Feb'y, 1883, as of day when motion was made.

"Feb'y 12th, 1883.

"ROB'T P. DICK, *Judge.*"

And this order has endorsed on it:

"The above order filed in open court Feb'y 14, '83.

"H. C. COWLES, *Cl'k.*"

That the court then sustained the demurrer and dismissed the bill of your petitioners with cost-, to be taxed, against them and their surety for the prosecution, and a decree to that effect was signed, filed, and enrolled; and your petitioners being dissatisfied with the rulings of the court upon the motion to amend as well as with the decree of the honorable court sustaining the demurrer of the defendants and dismissing your petitioner's bill, wherefore they appeal from the whole of said rulings & decree of said circuit court of the United States and respectfully pray that the decree of the

52 said circuit court and the bill, demurrer, joinder in demurrer, application, and motion to amend and the order & rulings of the circuit court may be sent to the Supreme Court of the United States without delay, and that said Supreme Court will proceed to hear the said cause anew, and that said decree of the circuit court and every part thereof may be rescinded and reversed and a decree entered in favor of appellants, as prayed in their said bill, with costs, or such other decree as to the said Supreme Court shall seem just.

This Jan'y 26th, 1885.

D. M. FURCHES,
Sol. for Appellant.

With an endorsement thereon in the words and figures as follows, to wit: Appeal allowed Jan'y 29th, 1885. Rob't P. Dick, U. S. judge.

53 And on the 30th day of January, 1885, a "citation on appeal" is issued out of our said court in words and figures as follows, to wit:

Circuit Court of the United States for the Western District of North Carolina, in the Fourth Circuit. In Equity.

ISAAC TAYLOR and SALLIE A. HOWES & Others
against
MOSES L. HOLMES, REUBEN J. HOLMES, & Others.

By the Hon. Robert P. Dick, one of the judges of the circuit court of the United States for the western district of North Carolina and the fourth circuit.

To Moses L. Holmes, Reuben J. Holmes, Ephraim Manney, and Valentine Manney:

Whereas Isaac Taylor and Sallie A. Howes have lately appealed to the Supreme Court of the United State from a decree lately rendered in the circuit court of the United States for the western district of North Carolina and fourth circuit, at Statesville, N. C., made in your favor, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 12th day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Greensboro', in the
54 western district of North Carolina, in the fourth circuit, the 30th day of January, in the year of our Lord one thousand eight hundred and eighty-five.

ROB'T P. DICK,
U. S. Judge.

And on February the 20th, 1885, the said citation is returned with an endorsement thereon in words and figures as follows, to wit:

I hereby certify that I executed the within citation by delivering a true copy of the same to J. M. McCorkle, Esq., as the att'y of the defendants therein named, in the town of Salisbury, N. C., on the 19th day of February, 1885.

T. B. KEOGH, *Marshal*,
By M. L. BEAN, *Dep'y*.

55 Circuit Court of the United States for the Western District of North Carolina, in the Fourth Circuit. In Equity.

ISAAC TAYLOR, SALLIE A. HOWES, & Others
against
MOSES L. HOLMES, REUBIN J. HOLMES, & Others.

Know all men that I, John M. Furches, of Statesville, No. Carolina, am held and firmly bound to Moses L. Holmes, Reubin J. Holmes, Ephram Manney, and Valentine Manney, the defendants

in the above-entitled suit (as the surety of Isaac Taylor and Sallie A. Howes, the above-named plaintiffs), in the just and full sum of two hundred (200) dollars; the payment whereof, well and truly to be made and done, I bind myself, my heirs, executors, and assigns, this the 29th day of January, 1885.

55½ The condition of the above bond and obligation is such that whereas the above-named plaintiffs, Isaac Taylor and Sallie A. Howes, have appealed from a judgment of the circuit court of the United States for western district of North Carolina and the fourth circuit, at Statesville, N. C., in equity, in which the said Moses L. Holmes, Reuben J. Holmes, Ephram Manney, and Valentine Manney are defendants:

Now, therefore, upon the said appel-ants sustaining their said appeal in the Supreme Court of the United States, or in case of a failure to do so, then upon their paying all such costs as shall be awarded and adjudged against the said defendants, said bond and obligation is to becom- nul- and void, but otherwise to be and remain in full force and virtue.

Witness my hand and seal this the day and date above writ-en.

[SEAL.] J. M. FURCHES.

56 Personally came before me John M. Furches, the signer of the above bond, who is personally well known to me, and makes affidavit that he is worth the sum of four hundred dollars over and above his homestead, personal property, exemptions, and liabilities.

J. M. FURCHES.

Subscribed and sworn to before me this the 29th day of Jan'y, 1885.

[Seal Iredell County Superior Court, North Carolina.]

J. B. CONNELLY,
C. S. C. Iredell County, N. C.

Approved January 30th, 1885.

ROB'T P. DICK,
U. S. Judge.

57 [Endorsed:] Isaac Taylor & Sallie A. Howes *vs.* Moses L. Holmes & others. Appeal bond. Filed in office Jan'y 31, '85. H. C. Cowles, cl'k.

58 UNITED STATES OF AMERICA, *Western Dist. of N. C.:*

Circuit Court, 4th Circuit, at Statesville.

I, H. C. Cowles, clerk of the said court, do hereby certify the foregoing to be a full, complete, and true exemplification of the record of the cause of Isaac Taylor and Sallie A. Howes, complainants, against Moses L. Holmes, Reuben J. Holmes, Ephraim Manney, and Valentine Manney as the same remains on file and of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court of the United States, at office, in the town of Statesville, on this the 20th day of February, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal United States Circuit Court, Western Dist. of N. C.]

H. C. COWLES,
Clerk of said Court.

Endorsed on cover: W. North Carolina C. C. U. S. No. 209. Isaac Taylor and Sallie A. Howes, appellants, *vs.* Moses L. Holmes, Reuben J. Holmes, Ephraim Manney, and Valentine Manney. Filed March 3, 1885.

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Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 209.

ISAAC TAYLOR AND SALLIE A. HOWES,

Appellants,

vs.

MOSES L. HOLMES, REUBEN J. HOLMES, EPHRAIM MAUNEY AND VALENTINE MAUNEY.

OPINION OF THE COURT BELOW.

CLARENCE R. CONGER.

SEAMAN & CONGER,
140 Nassau Street, New York.

Evening Post Job Printing Office.

United States Circuit Court,

WESTERN DISTRICT OF NORTH CAROLINA.

AT STATESVILLE, N. C., OCTOBER TERM, 1882.

ISAAC TAYLOR ET AL.

vs.

MOSES L. HOLMES ET AL.

A. B. CONGER and D. M. FURCHES, Sol'rs for Plaintiffs.
J. M. MCCORKLE, Sol'r for Defendants.

OPINION OF THE COURT.

DICK, *D. J.*—The general demurrer of the defendants is a denial in form and substance of the right of the plaintiffs to have their case considered and acted upon by the Court;—and is an admission of the truth of the allegations of the matters of fact set forth in the bill which are properly pleaded.

It is necessary, therefore, for the Court to consider what are the allegations of material facts which are set forth in the bill;—whether they are stated in direct terms and with sufficient precision to show that there is a definite equity in behalf of the plaintiffs entitling them to the relief demanded. Whether the plaintiffs have lost their right to relief by the bar of a statute of limitations or by lapse of time unexplained by proper equitable circumstances; and whether all necessary parties have been made so that the

Court can put an end to the litigation by adjusting and settling in this suit the rights of all persons who are interested in or affected by the subject matter in controversy.

As there was considerable discussion by counsel as to the force and effect of a demurrer, and as to the extent that it can be made available in defense, I will state, briefly, some of the well settled principles on this subject. A demurrer is applicable to any defense which may be made out from the allegations in a bill, but the most ordinary grounds of demurrer, are want of jurisdiction, want of equity, multifariousness and want of parties. By demurrer a defendant may properly insist upon staleness of claim, the statute of limitations and long acquiescence in his adverse possession and claim.

The protestation usually inserted in a demurrer is a practice derived from the common law and has no effect in limiting admissions as to facts properly alleged in the pending suit.

The formal statement of causes of demurrer, though usual, is not absolutely necessary. The assertion of a general demurrer is, that the plaintiff has not on his own showing made out a case. If the causes of demurrer are not formally set forth the plaintiff may object and require them to be thus stated. If the defendant assign causes of demurrer *ore tenus* he will not generally be entitled to costs, for if the objections had been formally stated the plaintiff might have submitted to the demurrer and asked leave to amend his bill.

Where a demurrer for want of parties is filed, the demurrer should point out the proper parties and thus give the plaintiff an opportunity to amend; but this rule does not apply where it appears from the face of the bill that the plaintiff has sufficient information or to the names, interests and residences of the proper parties. If the objection as to parties be made *ore tenus* at the hearing the plaintiff will be allowed to amend without costs.

In order to present clearly the questions of law discussed

and decided in this case I will give a brief outline of the material allegations in the bill.

The plaintiffs allege that they are the owners and holders of nearly three-fourths of the stock issued by the Gold Hill Mining Company, a corporation duly created and organized under the laws of New York on the 30th of August, 1853, for the purpose of carrying on the business of mining in the County of Rowan and State of North Carolina. The capital stock was fixed at one million of dollars, in two hundred thousand shares, at five dollars a share; and the corporation was to continue for twenty-five years; and its principal place of business was in the City of New York. That on the 1st day of September, 1853, the defendant, Moses L. Holmes, offered and agreed to sell the property in controversy to certain persons for the benefit of said corporation and convey the same by unquestionable titles. The amount which he was personally to receive for such sale and conveyance was one hundred and fifty-one thousand dollars and thirty thousand shares of the stock of the corporation. The company also agreed to pay off incumbrances to be placed on the property to the amount of one hundred and twenty-five thousand dollars. The other defendants being interested in the said property agreed upon the receipt of their share of the purchase money to join in a conveyance with said Moses L. Holmes, and they all did on the 4th day of October, 1853, execute a deed to the President and Directors of said company for the consideration then stipulated and fixed at $299,500, conveying six tracts of land containing in all five hundred and seventeen acres, &c. This deed was in some respects imperfect and did not convey a fee simple title for the want of proper words of limitation to convey a fee. On the 9th day of July, 1855, the defendants executed another deed for said property to Isaac H. Smith, President, his successors and assigns, in trust that he should stand seized and possessed thereof, for the benefit of the company, &c.

This deed was defective in not containing appropriate words of limitation to convey a fee as contemplated by

the parties to the contracts of sale. The said Isaac H. Smith died in 1858, and never made or attempted to make a conveyance of said property.

The bill further alleges that the defendants were acting Trustees and Superintendents of the company from the commencement of its operations until December, 1860, when the last incumbrance was removed, the company then being left in debt over $40,000 as the result of its operations, besides $20,000 assessed on its stock.

The bill then alleges that the defendants knowing that there were not proper words of limitation in the said deed to Isaac H. Smith to convey the fee, and that on his death they held the legal title, as reversioners, and that they were bound to execute the trusts arising from their contracts with the company, neglected and refused to execute proper deeds to carry out such trusts, but on the 10th day of July, 1861, by threats and armed violence did drive off the servants and agents of the Company and take possession of all the property then owned by the Company at Gold Hill, convert the rents and profits to their own use, and caused the said property to be sold under attachments, and thereafter pretended that they had acquired a perfect title, and have also fraudulently suffered said lands to be sold, and incumbered with mortgages which are clouds upon the title of the Company, &c.

The bill further alleges—that the Company besides the purchase money mentioned in said deeds, spent large sums in purchasing other real estate at Gold Hill, and in improvements thereon, of all which it had possession until July 10th, 1861; thereafter becoming "utterly disorganized;" its directors holding no meetings after 1862, and only one of the directors now survives, and he incompetent and neglecting to protect its rights and those of its stockholders and creditors.

The bill further alleges that the *feme* plaintiff was married in 1864 and still remains under the disability of coverture. The prayer for relief is that the defendants be required to execute proper deeds and conveyances according to their contracts with the Gold Hill Mining Company, to

a Trustee appointed by the Court to hold to the use of the creditors and stockholders of said Company; and that said defendants be compelled to account for personal property used and destroyed and for rents and profits since July 10th, 1861, &c.

When we consider the terms of the original contract of August 30th, 1853, and of other subsequent contracts, and the language of the deeds of October 4th, 1853, and July 9th, 1855, and all the circumstances attending the whole transaction, we conclude that the manifest intent and object of all the parties were that the said deeds should convey a fee-simple title to the lands mentioned, and that this intent and object was not accomplished on account of the mutual mistake of the parties and the inadvertence or unskillfulness of the draftsman in not using appropriate words of limitation in the deeds. Although it is a general rule that a mistake of law furnishes no ground for the interference of a Court of Equity, yet this rule is sometimes departed from when there is a plain, admitted or undisputed mistake of law arising from ignorance or inadvertence. Snell vs. Insurance Co., U. S. R., 85.

There could scarcely be a clearer case for a Court of Equity, if applied to by proper parties, in proper time, and in a proper manner to interfere and furnish adequate relief by exercising its powers of correction of written instruments and specifically enforcing contracts for the sale of land. The contracts were in writing within the provisions of the Statute of Frauds; they were certain and fair in all their parts; they were founded upon valuable and adequate considerations paid and received by the respective parties. The officers of the corporation were put in possession of the premises and expended large sums of money in buildings, repairs and improvements, the vendors were capable and could easily perform the agreements of the contracts, and the errors in the deeds were caused by the mutual mistake of the parties. Nearly all the elements which constitute the equity for correction and specific performance are to be found in this transaction.

It is a well settled principle in equity jurisprudence, that

where a person for valuable consideration contracts in writing to sell lands to the use and benefit of another, an implied trust arises in favor of the vendee against the vendor and his representatives and those claiming under him as volunteers or with notice of the contract. When things are thus contracted to be done, Equity treats them, for many purposes, as if they were done, and will specifically enforce such contracts by decreeing a proper conveyance or correcting a conveyance which fails to accomplish the purposes of the parties.

The right of specific performance accrued to the corporation in this case at the time it complied with the contracts of sale, and the equitable right of correction accrued at the time of the execution of the defective deeds on the 4th of October, 1853, and the 9th of July, 1855.

The corporation never instituted any suit for the enforcement of these clear and definite equities, and we will now consider whether the plaintiffs by the statements in their Bill have shown themselves entitled, after so long a lapse of time and after such material changes in circumstances, to the relief which they demand.

In considering the questions involved in this suit I will notice some of the many causes of demurrer assigned, and follow, as near as possible, the line of argument adopted by the counsel of the parties.

The counsel of the defendants presents these legal propositions: "The Bill shows that the Gold Hill Mining Company was created under the laws of New York, and all remedies affecting the rights of stockholders and creditors must be governed by the laws of that State, and this Court differing from the rules prevailing in State Courts, takes judicial notice of the laws of New York." I assent only to a part of these legal propositions. This Court can take judicial notice of the laws of the several States of the Union, and in construing the constitution and statute laws of a State, and the laws which regulate the rights of property in such State, will be governed by the decisions of its highest Courts, but upon other legal questions of a more general nature, and in the principles of equity jurisprudence a

Federal Court is influenced but not bound to follow decisions of State Courts.

When a corporation is created by a State statute, its powers, duties and privileges, and the mode of exercising them must depend upon the laws of the State which created it, and it can make no contracts and do no acts within or without such State except such as are authorized by its charter. It has no legal existence without the limits of such State. But where it is authorized by its charter to make contracts and acquire property, in general terms for the purpose of carrying on its legitimate business, and is invested with the capacity of suing and being sued, it may by the comity which is recognized to the fullest extent in this country, make contracts and acquire property in other States, and as to such contracts and property may seek the remedies afforded, and is bound by the obligations imposed by the laws of such States.

Bank of Augusta *vs.* Earle, 13 Peters.

As the Gold Hill Mining Company was authorized by its charter to make contracts and acquire property for the purpose of carrying on its business, and made contracts within the scope of its authority, as to real and personal property in this State, by which it acquired legal and equitable interests, its rights and remedies as to such property must be governed by the laws of this State.

It is further insisted by the counsel of the defendants, that as the Gold Hill Mining Company failed or neglected to pay its debts, and suspended its lawful and ordinary bu iness for more than a year subsequent to its disorganization in 1861, it was dissolved by virtue of the provisions of a Statute of New York. 2 Rev. Stat. of N. Y., page 706, Sec. 46.

I have not here referred to any decision of the highest Court of that State furnishing a construction as to the force and effect of said statute, and I cannot assent to the construction insisted upon by the counsel of defendants.

Causes of forfeiture do not operate *per se*, neither can they be taken advantage of collaterally, nor in any other

manner than by a direct proceeding instituted for the purpose against the corporation so that it may have an opportunity to answer. Such proceedings can be instituted by no one but the sovereign which created the corporation, and such sovereign may waive the right of forfeiture. Proceedings to enforce forfeitures belong to the common law jurisdiction of Courts, and Courts of Chancery do not deal with such questions unless empowered to do so by express statute. They can deal with officers of corporations as trustees for any abuse of their trusts or failure in the performance of duty. Neither the insolvency of the Gold Hill Mining Company nor the failure of the corporation to elect officers at the appointed time operated as a dissolution or was a virtual surrender of its franchises. A private corporation in this country is not composed of integral parts which are essential to its existence. The stockholders compose the company. The directors and officers are agents necessary for the active management of the affairs of the company, but they are not integral parts essential to its existence. A corporation possesses strong and tenacious principles of vitality derived from its charter bestowed by sovereign authority, and does not cease to exist until its dissolution is accomplished in a manner provided by law.

A corporation may surrender its charter to the sovereign power that created it, and thus determine its existence, but there must be some definite act of surrender, and an acceptance by the sovereign or its duly authorized agent. Mere non-user of its powers is not a surrender, and a Court would not be warranted in presuming a surrender from the abandonment of its franchises, in intention only, there must be a declared purpose and act on the part of the corporation to justify such an inference. In the charter of the Gold Hill Mining Company and in the laws of New York ample provisions were made to enable the company to effect a re-organization and put in operation its suspended powers. As the directors who controlled the affairs of the company in 1862 were trustees of an express trust which they had voluntarily accepted, they could not

divest themselves of that trust by a resignation of office without the assent of the corporation and before successors were appointed, and a Court of Equity upon proper application would have compelled them to have taken such steps as were necessary to secure the rights and interests of the creditors and stockholders of the company.

As the Gold Hill Mining Company was not dissolved in any manner provided or recognized by law, it remained a corporation until September 1st, 1878, when its corporate existence expired by the express limitation of its charter.

The rights and interests of the creditors and stockholders of a corporation are not extinguished or seriously impaired by its dissolution. Provisions are usually made either in the charter or by the laws of the State for winding up the business and securing the rights and interests of the stockholders and creditors in all trading, business and moneyed corporations. Equity regards the capital, property and debts of such corporations as trust funds pledged for the payment of the dues of creditors and stockholders, and has ample power to reach such trust funds and collect and apply them to the purposes of the trust.

Bacon vs. *Robertson*, 18 How., 480.

There was much learned discussion in the argument as to the power of stockholders to institute a suit to enforce the rights of a corporation. The general doctrine on this subject and its limitations is well stated in Dodge *vs.* Woolsey, 18 Howard, 331, and Howes *vs.* Oakland, 104 U. S. R., 450. It is well settled that a stockholder may sue the corporation to prevent or be relieved against fraud or breach of trust on the part of directors or trustees, and to restrain them from exercising powers outside of their chartered authority. As to matters which affect the rights and interest of a corporation, the general rule is, the corporation must sue to redress or prevent a wrong and secure a benefit, but a stockholder may bring a suit in behalf of himself and associates in a case where the corporation refuses to bring suit or when the directors, trus-

tees or other representatives are guilty of a fraud, a breach of trust or are proceeding *ultra vires*. In such a case the corporation and its officers or other representatives should be parties, so that they may have an opportunity of explanation and defense, and be bound by the decree, and thus prevented from bringing another suit involving precisely the same subject matter.

Davenport vs. *Dows*, 18 Wall., 626.

In the case before us the charter of the corporation had expired by effluxion of time four years before the bringing of this suit by the plaintiff stockholders. In the case of the dissolution of a corporation, provision is made in section 9, page 557, of the Rev. Stat. of N. Y. to authorize the existing directors or managers of such corporation, as trustees, to wind up the business of the company. From the bill in this case it appears that there were directors of the corporation at the time it suspended business in 1861, and they acted until 1862, and were in no way relieved from their duties and responsibilities by any act of the corporation, and one of such directors still survives. In a subsequent part of this opinion I will consider the question whether this surviving director is a necessary or indispensable party to the suit.

It is insisted by the counsel of the defendants that the plaintiffs by their statements in their bill have not shown themselves entitled to the interposition of a Court of Equity to grant them the relief prayed. That they have not stated positively and with sufficient certainty facts essential to their rights and within their own knowledge. They have not shown themselves to have been stockholders at the time the corporation acquired the equity which they seek to enforce, or the time when they became stockholders; whether they paid par value for their stock or purchased it when it was greatly depreciated by the indebtedness, embarrassment and disorganization of the company, or became owners of such stock after the expiration of the charter. They have not shown that they made any effort to reorganize the company, which they

could easily have done under the laws of New York, and by the chartered powers of the corporation as they were the owners of a large majority of shares of stock. They have not shown that they requested the directors or trustees of the corporation to institute suit for the enforcement of their rights. They have shown that the corporation was largely indebted in 1860 and have not shown that the directors had sufficient corporation funds to carry on proper litigation, or that means and suitable indemnity were offered to such directors. They have not shown that they at any time made earnest or even reasonable efforts for the redress of grievances complained of during the existence of the corporation, or with the trustees upon whom the rights of the corporation devolved upon its suspension of business or its dissolution.

These suggestions made by the counsel of defendants have received my careful consideration, and I regard them as having a material bearing upon the case, and I will state my conclusions upon the subject in a subsequent part of this opinion.

The chief causes of demurrer relied upon by the defendants to defeat the suit of the plaintiffs are the Statute of Limitations, lapse of time and staleness of claim.

In passing upon these questions it becomes necessary for me to consider the nature of the trust which existed between the defendants and the corporation arising out of the contracts and transactions, between the parties in relation to the property in controversy. A binding contract for the sale of land enforcible in equity, though in fact unexecuted, is considered as performed, and the land is in equity the property of the vendee and will devolve in a course of descent upon the heir of the vendee. When the vendee has paid all the purchase money he has a complete equitable estate and the vendor is a mere trustee of the legal title. If the vendee has paid only a part of the purchase money, then the vendor is a trustee to the extent of the money paid, and the vendee cannot demand the legal title until he has complied with the terms of the contract, but still there is an implied trust arising out of the

presumed intention and consent of the parties, that the vendor will make a transfer of the legal title when the balance of the purchase money is paid. In the case of a trust arising by implication out of the agreement of parties, as there is no conflict of claim or adverse possession between the trustee and *cestui qui trust*, statutes of limitation do not apply, until these consistent relations of the parties are changed into conflicting and adverse claims.

In the case of a constructive trust there is always some conflict of claim, and the party having the legal estate holds adversely, and does not become a trustee until he is converted into one by a decree founded upon fraud, breach of trust, or some inequitable benefit or advantage obtained by a person occupying a fiduciary relation to another.

In such cases of constructive trusts the Statute of Limitations will protect one who has the legal title and is sought to be converted into a trustee against his assent; and it begins to run from the time when the equitable rights of the other party accrued.

Taylor vs. *Dawson*, 3 Jones Eq., 83.

The written contracts in this case did not create an express trust. There were no direct and express terms of trust imposed by the makers. Voluntary or express trusts cannot be imposed upon any person unless he agrees to accept or by clear implication assumes the duties and liabilities. Acceptance of a trust in the case of an implied, resulting or constructive trust is not necessary, as the law holds a person liable to the performance of such trust, whether he is willing or unwilling to accept the situation.

It is insisted by the plaintiffs that in this case there is a constructive trust arising out of the fraudulent conduct of the defendants, and that length of time will not operate as a bar to a suit in equity where such fraud is admitted by the demurrer of the defendants. To sustain this position there must not only be shown an established trust, but some ***actual*** and ***intentional*** fraud practiced upon a *cestui*

qui trust by a trustee, which has been concealed from the *cestui qui trust.*

Clarke vs. *Boorman*, 18 Wall., 493.
Godden vs. *Kimmell*, 9 Otto, 201.

A demurrer only admits matters of facts positively alleged, and not conclusions of law or mere pretenses and suggestions, nor the correctness of the ascription of a purpose to parties when not justified by the language used and facts positively alleged.

Dillon vs. *Barnard*, 21 Wall., 430.

The mere allegations in the bill that the defendants knew of the existence of the legal defects in the said deed, and neglected and refused to rectify the same is not sufficient to imply constructive fraud, as the agents of the corporation had full knowledge of the defect or the means of such knowledge in their hands. There is no direct averment that the defendants were ever requested to rectify such deeds. The error in the deed was a plain mistake of a clear and well settled principle of law, and it is upon the ground that there was a mutual mistake of law caused by ignorance or inadvertence, that the plaintiffs can claim the interference of a Court of Equity to grant relief. Ignorance of law by one party to a contract is not generally a ground for relief in Equity, as a party to a contract is presumed to know the law which affects his rights and obligations.

In the matters of fact positively alleged in this case there are none of the elements of actual and intentional fraud. The defendants did not misrepresent any material matter to produce a false impression or in any way mislead the agents of the corporation to obtain undue advantages.

There was no evil act with an evil intent. They did not conceal any material facts or remain silent as to any. The want of proper words of limitation in the deeds to convey a fee simple title to the lands was as well known to the agents of the corporation as to the defendants, or such

agents might easily have acquired information as to such defects, as the deeds were duly accepted and registered by them and constituted a link in the chain of title to lands in which they had undisturbed possession for more than six years.

No statute of limitation began to run against the corporation while its agents were in possession, and the defendants as implied trustees had not disputed the equitable rights of the corporation, or set up any adverse claim. When the defendants took forcible adverse possession of the lands and other property in 1861, the statute of limitations had been suspended in this State by legislative enactments and remained suspended until January 1st, 1870. From that date the statute of limitations began to run in favor of the defendants as they held the possession of the lands adversely to the Gold Hill Mining Company. As possession was thus held adversely for more than seven years, under the legal title, and with known and visible boundaries, the legal and equitable claims of said corporation were barred—*Bat. Rev.*, 147.

As such corporation was agent and representative of the stockholders who were entitled to rights and interests by and through the corporation, I am inclined to think that the stockholders were also barred, and the coverture of the *feme* plaintiff did not prevent the bar as to her rights.

Welborne vs. *Finley*, 7 Jones, 228.
2 *Perry on Trustees*, Sec. 458.
Herndon vs. *Pratt*, 6 Jones, Eq. 327.
Kerrison vs. *Stewart*, 3 Otto, 155.

The fact that the plaintiffs were non-residents of the State did not prevent the operation of the statute of limitations (*Hanes* vs. *Hanes*, 71 N. C., 174,) and this construction of the statute was adopted by the Supreme Court of the United States in *Davie* vs. *Briggs*, 97 U. S. R., 628.

The force and effect of the statute of limitations was not only to bar the remedy of the corporation but to extin-

guish its rights, and vest a perfect title in the adverse holders.

Federal Courts in passing upon questions relating to property situated in the several States recognize statutes of limitations, and give them the same construction and effect that are given by the local tribunals.

When a statute of limitations applies to a legal proceeding or a legal right, courts of equity will in analogous cases consider equitable rights as barred by the same limitations where nothing has been done or said directly or indirectly to recognize such equitable claims by the adverse possessor.

Elmendorf vs. *Taylor*, 10 Wheaton, 367.

A statute of limitations where it applies is an absolute bar, and, allegations of justness of claim, ignorance or any kind of hardship cannot avoid its operation. If such circumstances were allowed to control there would be no end to litigation and no certain rules of property.

2 *Perry on Trustees*, 484.

Statutes of limitation are founded in a wise and salutary public policy and promote the peace and well being of society by quieting titles to property, and putting an end to stale demands.

It was insisted by the defendants that without reference to any statute of limitations, Courts of Equity have adopted the principle that unreasonable delay in the assertion of a right by suit will defeat recovery or relief, and questions as to *laches* and lapse of time are to be determined by the particular circumstances of each case. We will briefly consider this matter as it was elaborately discussed by counsel on both sides of the case.

In 1855, upon the execution of the defective deed to Isaac H. Smith by the defendants, the corporation had a clear and definite equity for the correction of said deed as it was founded upon a large, valuable and adequate consideration, and the defects in the conveyance resulted from a mutual mistake of the parties. The corporation

through its officers and agents took possession of the premises, made large expenditures for improvements and continued to exercise control over the property until 1861. At this period it was so much embarrassed by debts that it was unable to carry on its business and became " completely disorganized."

These embarrassments could not then be relieved by any efforts of the stockholders as most of them were citizens of the Northern States and were excluded from the limits of this State by the disturbed condition of public affairs produced by a civil war. It is alleged that the defendants who were stockholders and had been directors and managers of the business of the corporation, with armed violence took possession of the property and drove off the agents of the corporation, and have continued to this time to hold possession, receive rents and profits, and have mortgaged and otherwise dealt with the property as absolute owners.

Upon this statement of facts, if the plaintiffs in their bill had shown any plausible reason for their long delay in asserting their rights, and if lapse of time was the only defense interposed by the defendants; I would overrule the demurrer and require them to answer such grave charges of injustice, wrong and oppression against the absent stockholders with whom they had been associated in fiduciary and friendly relations.

It appears from the bill that about five hundred acres of land were purchased from the defendant for mining purposes, that the capital stock of the company was fixed by the charter at $1,000,000, in shares of five dollars each, that the business was regularly carried on for more than six years; that the company in December, 1860, owed forty thousand dollars of indebtedness and had not sufficieent available assets to discharge the same; and that the Company became " utterly disorganized " and ceased to exercise its corporate functions.

We may well infer from these facts and circumstances disclosed in the bill, and from the history of such hazardous enterprises, that the mining venture of the company,

became a failure, that the land became greatly depreciated in value, and the large amount of shares of stock which were issued became almost worthless, and could be purchased at a nominal value. We may also well infer that the creditors of the company made some efforts to collect or secure their debts out of the general wreck of the hazardous and unfortunate enterprise. After such long delay in asserting their rights, the plaintiffs ought to show some equitable reason for such delay, and substantial merits to repel such unfavorable inferences.

The plaintiffs have not shown when they became stockholders, whether they entered into the original enterprise or for a small price purchased the stock in the market after the failure of the company or after the expiration of its charter. If they were stockholders in 1861 at the time of the disorganization of the company they have not shown that they made any effort to reorganize the company, which they could easily have done under the provisions of its charter and the laws of New York.

The disturbed condition of public and private business which prevailed in this State during the civil war, did not prevail in New York where the corporation had its chartered existence and where most of the holders of stock resided. After the termination of the civil war in 1865 the State and Federal Courts were open for the administration of justice, and the rights of property of which the plaintiffs were temporarily deprived by the armed violence of the defendants, could easily have been restored by the courts, or the military power that prevailed in this State for three years. The rights of property of citizens of the Northern States were not affected by the statutes of limitations, or legal proceedings in the courts of the insurrectionary States during the civil war.

As the plaintiffs have not set forth their claims with sufficient certainty, and have not assigned any reasons why they have so long slept upon their rights they cannot properly complain at the operation of well settled principles of equity jurisprudence upon the subject which have been

adopted and are enforced for the peace and well being of society.

Badger vs. *Badger*, 2 Wall.
Howes vs. *Oakland*, 104 U. S. R., 450.

There can be no fixed and definite rule established by a court of equity as to what delay in asserting a right will amount to an equitable bar from lapse of time, as there are different circumstances and elements involved in each case. I think, however, that the principle insisted upon by the counsel of defendants in his brief is well sustained by reason and authority; that "in mining property which is hazardous, uncertain and speculative, greater diligence is required in asking for the specific performance of contracts relating to mining lands, than to other lands."

Leading Cases on Mines, &c., 397.
Twin Lick Oil Co. vs. *Marbury*, 91 U. S. R., 587.

As my decision in this case may be reviewed in the Supreme Court I feel it to be just to the defendants to consider other causes of demurrer which have been assigned.

The defendants insist that this bill cannot be sustained in behalf of the *feme* plaintiff as it appears that she is a *feme covert* suing in her own name, and her husband is not made a party. The rules of equity pleading upon this subject are too familiar and well settled to need discussion or much citation of authority. A *feme covert* must sue and be sued jointly with her husband unless she claims a right in opposition to him, in which case her *prochien ami*, with her consent may exhibit a bill in her behalf, and her husband be made a party defendant. Courts of Equity will in some cases recognize a *feme covert* as capable of disposing of her separate property and doing other acts as a *feme sole*. She may in some instances act as a trustee, or execute a power, without the concurrence of her husband, if such act does not defeat a right of the husband, or impose a legal responsibility upon him. But in all suits in equity in which a *feme covert* sues or is sued, the husband must

be a party plaintiff or defendant whenever he is within the jurisdiction of the court and can be made a party.

Story's Eq. Pleading, Sec. 63.
2 *Story's Eq. Juris.*, Sec. 1368.

The rules of equity pleading upon this subject are not affected in any manner in this court by the right which a *feme covert* may have to institute suits in her own name, under State laws, as the Practice Act of 1872, Rev. Stats. of U. S., Sec. 914, does not apply to the pleadings and modes of procedure in Federal Courts of Equity.

Blease vs. *Garlington*, 92 U. S. R., 1.

The bill does not show whether the interests of the *feme* plaintiff are adverse to, or in confirmity with those of her husband. If it appeared that she is suing for her separate estate and the husband refused to join with her in the suit I would allow a proper amendment so as to introduce a *prochien ami* and make her husband a defendant, and this amendment would not oust the jurisdiction of the court on account of the same citizenship of the parties, as the husband, defendant, would be only a formal party.

Wormly vs. *Wormly*, 8 Wheaton, 451.

If, however, the husband has a substantial adverse interest to the *feme* plaintiff then such amendment could not be allowed. The husband is an indispensable party to a suit in equity where the wife sues or is sued, and his non-joinder is sufficient cause for the dismission of a bill, if an amendment making him a party cannot properly be allowed.

It is a general rule in equity that all parties interested in, or entitled to litigate the same questions in controversy are necessary parties. They must be expressly made parties or the bill must be so framed as to give them an opportunity to come in and be made parties. This principle is only departed from when it is extremely difficult or inconvenient to enforce this rule. This general principle has in some degree been modified by Sec. 733, Rev. Stat., and

the 22d and 47th rules adopted by the Supreme Court for the regulation of the practice of U. S. Courts of Equity. By virtue of this statute and these rules Courts of Equity may dispense with merely formal parties, and in cases where the real merits of the cause may be determined without essentially affecting the interests of absent parties, whose interest are separable from the other litigants, it may be the duty of such courts to make a decree as to the parties before them. But neither the Act of Congress nor the rules of the Supreme Court enables the Circuit Court to make a decree in equity in the absence of an *indispensable* party whose rights must necessarily be affected by such decree.

This principle is founded upon the broad ground of natural equity and justice that prevails in all systems of enlightened jurisprudence, that no court ought to adjudicate directly upon a person's rights without the party being either actually or constructively before the Court with opportunity for explanation and defense.

Although it is a general rule in Chancery that a bill will not be dismissed for the want of proper parties, yet, if upon the hearing of a bill the Court sees that an indispensable party is not on the record, and cannot be made a party without ousting its jurisdiction, it will refuse to proceed and dismiss the bill.

Shields vs. *Barrow*, 17 How, 130.
Bank vs. *Railroad*, 11 Wall, 624.

There are other questions which were presented in the pleadings and they were insisted on in the argument, as to what were the rights and interests of the creditors of the corporation for whom relief is asked in the prayer of the bill; and what were the rights, duties and responsibilities of the directors of the Gold Hill Mining Company.

All the rights, interests and property of an insolvent or dissolved corporation constitute a trust fund and are held *first* for the payment of creditors and *second* for the benefit of the stockholders.

It appears on the face of the bill that at the time the

corporation suspended the exercise of its functions and franchises in 1861 there were creditors to the amount of forty thousand dollars and there were no available assets for immediate payment. There was an assessment on the stock to the amount of twenty thousand dollars, but it does not appear that the same was collected and applied in payment of debts.

It in no way appears that the prior and exclusive equities of creditors have ever been adjusted and discharged by the corporation assets. Under such circumstances it seems to me that this Court cannot proceed to make a decree as to the secondary and subordinate equities of the stockholders to the property of a once insolvent and now dissolved corporation, unless the existing creditors (if there be any) are in some way represented in this suit. This is a stockholders bill and they cannot properly represent the rights and interests of creditors, which are not identical with those of the plaintiffs, but different, superior and conflicting. But for the prayer in the bill for relief in behalf of creditors, I would suppose that all the claims of the creditors had been satisfied and discharged under proper legal and equitable remedies afforded by the Courts, or had been barred by the statute of limitations. The creditors could have reached the property of the corporation by legal and equitable process and I cannot imagine any reason why they should have slept upon their rights for twenty years. If the property was sold under proper legal process the purchasers acquired good titles. If the defendants, who were trustees, purchased the property, (as is intimated in the bill,) at a fair and open sale under legal process and at the highest price that it would bring at auction, this transaction was neither fraudulent or void. It may be that on account of their fiduciary relation to the corporation and the stockholders they might in a reasonable time have been declared trustees for the *cestuis qui trust*. In such cases the *cestuis qui trust* must seek their relief in reasonable time, and we have already considered sufficiently the facts and

circumstances of this case as to the reasonable diligence of the plaintiffs in seeking relief.

Twin Lick Oil Co. vs. *Marbury, supra.*

It appears in the bill that there were directors in 1861 when the corporation suspended business and that they continued to act until 1862, and they were not discharged from their duties and responsibilities in any manner provided in the charter or the laws of the State of New York. As directors they were strict trustees of the creditors and stockholders and it was their duty to have taken care of the corporate property under their control and to have maintained the rights and consulted the advantages of their *cestuis qui trust* by instituting proper legal proceedings to enable them to perform the duties of the trust with which they were invested.

The bill does not allege that the directors were requested to institute suit against the defendants, or that they had the trust funds, or were offered proper indemnity for such legal proceedings. It was the duty of the directors or trustees to have rendered proper accounts of their transactions showing what disposition they had made of the property under their control.

When a direct trust is unclosed, the statute of limitations does not protect trustees or their legal representatives from liability.

As the directors were strict trustees, and voluntarily accepted the trust, they could not divest themselves of the trust by a resignation unaccepted by the *cestuis qui trust* unless some other method was provided in the charter or by the laws of the land.

The bill does not show when any of the directors died, or when or how any of them resigned office. If the trust of the directors was continued by a failure of the corporation to elect other directors as successors in office, then it may be that the directors who were living in 1878 when the corporation was dissolved by the expiration of its charter, became trustees of the rights and property of such corporation by virtue of the statute of New York.

1*st Rev. Stat.*, Sec. 9, page 557.

The allegations in the bill are admitted by the defendants, so far as they are affected by such allegations, but such admissions do not dispose of the rights and responsibilities of the directors and their legal representatives who are not parties.

It seems to me that the directors, or their legal representatives, ought to be made parties, so that they may have an opportunity of being heard, and have the whole subject matter in controversy so adjusted and settled by a decree of this Court, as to free them from the duties and liabilities of future litigation.

I will not further consider or determine this question, as there are other sufficient causes for the dismission of the bill.

I will dismiss the bill on the following grounds:

1st. Want of certainty in allegation to show that the plaintiffs are entitled to the relief demanded.

2d. The right to relief has been barred by the statute of limitations.

3d. The long and gross negligence of the plaintiffs in seeking relief, unexplained by sufficient equitable reasons and circumstances.

It is ordered that the bill be dismissed, with costs

127-489

SUPREME COURT U.S.
FILED
MAR 26 1888
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 209.

ISAAC TAYLOR AND SALLIE A. HOWES,
Appellants,

vs.

MOSES L. HOLMES, REUBEN J. HOLMES, EPHRAIM MAUNEY AND VALENTINE MAUNEY.

BRIEF AND ARGUMENT FOR APPELLANTS.

CLARENCE R. CONGER.

SEAMAN & CONGER,
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Appeal from the Circuit Court of the United States for the Western District of North Carolina.

STATEMENT.

This is an appeal from the Circuit Court of the United States for the Western District of North Carolina and the Fourth Circuit from the decision of Judge Robert P. Dick, sustaining the demurrer of defendants herein and dismissing the bill of the plaintiffs.

The following is a brief statement of the facts of the case: On the thirtieth day of August, 1853, the Gold Hill Mining Co. was formed under the laws of the State of

New York for the purpose of conducting the business of mining at Gold Hill, in the County of Rowan and State of North Carolina, its incorporators being seven in number; all of which incorporators were citizens of the State of New York, except Moses L. Holmes, one of the defendants herein, who was a citizen of the State of North Carolina. On said 30th day of August, and prior to the signing of the certificates of incorporation, the said Moses L. Holmes did in writing offer to sell to three of those named in the incorporation as trustees, with one other (Maxwell), the estates, mines and property that form the subject matter of this suit. The consideration for such sale, as named in such offer, was the sum of $60,000, and the creating of corporate incumbrances upon the property sold, in the sum of $125,000. Immediately thereafter, and on September 1st, 1853, and in pursuance of such offer, the said Moses L. Holmes entered into a contract of sale, this time directly with the corporation, The Gold Hill Mining Co., and covering the same property. The consideration in this contract was stipulated and fixed at the gross amount of $299,500. $125,000 of this last named sum was to be paid in incumbrances on the property to be created by said corporation in favor of said Moses L. Holmes and the other owners who were to join with him in the sale. There is no dispute but that the whole of this $299,500 was altogether and completely paid by the company to said Moses L. Holmes, and these other owners who were Reuben J. Holmes, Ephraim Mauney and Valentine Mauney, defendants herein.

There appears to have been considerable confusion and delay on the part of the defendants in the execution and delivery of the deed contemplated in the contract then fully paid for. One deed was not delivered but deposited *in escrow* with one Burton Craige, Esq., who had prepared said deed, to be thereafter delivered on payment by the company of the said incumbrances, but it never was actually delivered, though all of said incumbrances were fully paid. This deed, dated October 4, 1853, failed to convey a fee by reason of its defective wording. Subsequently, a deed bearing date July 9, 1855, of the same property and embracing the same consideration

as the prior deed, was executed and delivered to Isaac H. Smith, one of the original incorporators of said company, as a trustee. This deed in its *habendum* clause contained the following: "In trust, nevertheless, that the said party of the second part shall stand seized and possessed of the premises hereby conveyed to the only proper use and behoof of the Gold Hill Mining Co., a body politic, organized and chartered by the acts of the Legislature of New York, and in trust to apply all the incomes and profits of said premises to the use of the said Gold Hill Mining Co., and convey the same to whomsoever the said Gold Hill Mining Co. may designate and appoint." This deed to Isaac H. Smith was in like manner defective; while intended to convey the fee it actually conveyed but a life estate, and the said Isaac H. Smith died in the year 1858 without ever having made any conveyance of the same.

Meantime, the Gold Hill Mining Co. entered into possession of the property, purchased various other tracts of land adjoining the same and expended large sums of money in the purchase of machinery in and for the prosecution of its business of mining ores and extracting gold therefrom. The defendant, Moses L. Holmes, one of the grantors in the deeds above mentioned, was during all this time a director or trustee of the corporation. He subsequently resigned this office in favor of his brother, Reuben J. Holmes, one of the defendants herein and also one of the original grantors in said deed. The remaining defendants, Ephraim Mauney and Valentine Mauney, being also the other remaining original grantors in the deed above mentioned, were employed on salaries by the said Gold Hill Mining Co. as superintendents during this time and the years immediately following. It also appears in the bill that, in addition to these emoluments, Moses L. Holmes and Valentine Mauney made claim to the company in 1855 that they had made payments on behalf of the company to the extent of twenty thousand dollars ($20,000), and that in response to such claim the sum of twenty thousand dollars was actually raised by extra assessment upon the stockholders and paid over to them.

Matters remained in this way until the breaking out of the late war. Whereupon, and on or about the 10th day

of July, 1861, the said defendants herein proceeded to enter upon the said property of the Gold Hill Mining Co., and drove off therefrom its agents and servants by threats and armed violence, and have ever since occupied and possessed the same, converting the property and machinery of the company to their own use, and appropriating to themselves all profits derived from said mining property since said time.

The plaintiff, Isaac Taylor, is a citizen of Massachusetts. The plaintiff, Sallie A. Howes, is a citizen of the State of New Jersey. She was married in the year 1864, and still remains under the disability of coverture. At the time of commencing this suit all the directors or trustees of said company were dead except the defendants Moses L. Holmes, Reuben J. Holmes and one other, Amos Howes, the husband of the *feme* plaintiff. The bill sets forth that the said Amos Howes is not made a defendant herein for the reason that his joinder would oust the jurisdiction of the Court as to the parties before it, and because his interest is adverse and hostile to that of his wife, and also on the ground of his incompetency to serve as such director, and his actual abandonment of his duties as such; that the plaintiffs are the owners of more than three-quarters of the whole capital stock of the said Gold Hill Mining Co., and that the remaining stockholders have not been made parties, because their names and places of residences are, to a large extent, unknown to these plaintiffs; that the said Gold Hill Mining Co., by reason of the facts above set forth, and the action, as well as the inaction, of its officers and confidential agents, has, since the year 1861, become utterly disorganized and that for this reason the said corporation is not made a party defendant, as well as for the reason that it is a corporation created by a foreign jurisdiction.

By section 137 of the Code of Civil Procedure of the State of North Carolina it is provided that the time from May 20, 1861 to January 1, 1870, "shall not be counted so as to bar actions or suits or to presume satisfaction or abandonment of rights."

The Gold Hill Mining Company expired in 1878, by the limitation of its charter.

The defendants demurred generally to the bill of complaint, and hearing on the same was had at a regular term of the said Circuit Court on the third Monday in October, 1882, before the Hon. Robert P. Dick, Judge of the U. S. District Court, judge presiding. Pending decision the plaintiffs proposed amendments to the bill and asked to have them allowed by the Court. And on the fifth day of February, 1883, the motion for such amendments was disallowed, and the decree of the Court with its opinion was filed dismissing the bill, whereupon the said plaintiffs appealed from the whole of said rulings and decree of said Circuit Court to the Supreme Court of the United States.

Assignments of Error.

1. It was error to direct judgment for the defendants upon the demurrer.

2. It was error not to overrule the demurrer and permit the case to proceed to judgment upon the allegations of the bill.

3. It was error, on sustaining the demurrer, not to have given appellants leave to amend.

4. It was error to have considered upon the demurrer the objection that the right to relief has been barred by the Statute of Limitations.

Brief and Argument.

I.

Lapse of time will not of itself bar recovery in equity; but the Court will, in each case, consider the particular circumstances.

Allore *v.* Jewell, 94 U. S., 506.
The Key City, 14 Wall., 653.
Insurance Co. *v.* Eldridge, 102 U. S., 545.
Gunton *v.* Carroll, 101 U. S., 426.

We have in this case the *fiduciary* relations between the parties to explain why prior to 1861 the appellants took no steps to reform the deed dated October 4th, 1853. The grantors in that deed (the respondents here) were directors and salaried employees of the Gold Hill Mining Company (page 4, fols. 9, 10, 11).

The company was in possession of the land under the deed until July 10th, 1861 (page 5, fol. 13). The Code of Civil Procedure of North Carolina, § 137, provides: "The time between the 20th day of May, 1861, and the 1st day of January, 1870, shall not be counted so as to bar actions or suits or to presume satisfaction or abandonment of rights."

The bill avers that the appellant, Sallie A. Howes, was married in 1864, "and still remains under the disability of coverture" (page 6, fol. 15). The Code of North Carolina, § 148, provides that a married woman "entitled to commence any action for the recovery of real property * * * may, notwithstanding the time of limitation prescribed in this action be expired commence his action or make his entry within three years next after * * * discoverture."

II.

The Statute of Limitations cannot properly be pleaded on demurrer.

Burnley *v.* Town of Jeffersonville, 3 McLean, 336.

"But the objection that the action was not commenced within the time limited can only be taken by answer."

Code of Civ. Pro. of N. Carolina, § 138.

III.

The coverture of the appellant, Sallie A. Hawes, suspends the statute as against her so long as that coverture continues.

"When two or more disabilities shall co-exist, or when one disability shall supervene an existing one, the period prescribed within which an action may be brought shall not begin to run until the termination of the latest disability."

Code of Civ. Pro. of N. Carolina, § 149.

"Then, as the *feme* plaintiff did not become of age until 1866, the suspension of the Statute of Limitations saved her rights until the 1st of January, 1870. But before that time, to wit, in 1869, she went under the disability of coverture." "His Honor in the Superior Court held that the plaintiffs were not barred, and in this opinion we concur."

State *ex rel.* Lippard *v.* Trautman, 72 N. C., 551.

IV.

It is claimed that every fact especially within plaintiff's knowledge has been stated with sufficient clearness in the bill to enable defendants to frame their defence. But even if the Court considers they should be more fully set forth, the plaintiff should have leave to amend.

V.

The amendments disallowed by the Court below should have been allowed. (See page 15, fols. 36, 37.)

VI.

Where, as in this case, it is shown that the officers of a corporation are inactive, if not actually conspiring against their *cestui que trust*, equity will listen to the prayer of the stockholder, and where the term of corporation has expired, will treat the corporate property as a *trust fund* to be distributed under the eye of the Court.

Wood *et al. v.* Dummer *et al.*, 3 Mason, 308.
Nevitt *v.* Bank of Port Gibson, 14 Miss., 513.

VII.

This is especially a case calling for equitable interference. Without it these plaintiffs are remediless. Yet they have paid to the defendants, through the corporation which the defendants controlled, the full consideration agreed on for the land. There is here no innocent purchaser or third party who has parted with *his* money through lack of notice. The very men who sold the land and were paid for it, are now the claimants and possessors of it, the defendants in this suit. The parties are all before the Court.

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Supreme Court of the United States.

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BRIEF FOR THE DEFENDANTS.

This case is presented upon *bill* filed March 17, 1882, and *general demurrer* (folio 31). After argument in the circuit court the bill was dismissed (folio 38).

[Before proceeding to consider the case made by the bill as it now stands, it may be well to examine certain amendments thereof which were proposed by the complainants, and were rejected by the learned court below.

In this respect it appears that after the argument the court

took time to consider the questions presented, and thereupon adjourned until a certain day thereafter (folio 34). At that day a decision was rendered as above (folio 35), with the direction that a decree should be drawn and forwarded to the learned judge, then at home. Upon the same day (folio 36) the complainants submitted motions to amend the bill. This was denied.

These proposed amendments were, excepting one, in order to add a new *party;* the other was to insert, under a *videlicet*, a date which, in the printed record, would have come in after the word "attached," upon the 18th line of page 5, so as to make the *pretense* there ascribed to the defendants to be "that they had acquired to the whole of its real estate and property thereto attached, *to wit, on the 28th day of August, 1876*, a good and perfect title," the italicized portion being the proposed amendment.

Upon this matter it is submitted that—

1. The allowance was a matter within the *discretion* of the court under Equity rule 35; and that the record shows a case of *exercise*, not "*abuse*," of such discretion [referring to language in the last clause of the opinion in Bank *vs.* Carpenter, 101 U. S., 567], and therefore no appeal lies therefrom.

2. The proposed amendments relating to *parties* were immaterial, as no objection to the bill on that ground is competent under *general* demurrer.

3. The other proposed amendment stated above, besides seeming to be immaterial, might well have been rejected by the court on the ground that in form it appears to have been

a mere *pro re nata* hasty suggestion of counsel made to avoid some presumption that in its absence arose upon the face of the previous deliberate statement of their case by the complainants. One who, in pleading, makes an allegation as to "time" *under a videlicet*, thereby gives notice that "he does not wish to be held to prove it strictly." Stephen Pl. [293].

Besides, as already said, it would be only an amendment of an ascribed *pretense*. And, moreover, in any case it could not defeat the effect of *laches* or of *a statute of limitations*, to show that a person who had for some time been in defiant possession of property asserted that such possession matured into "a good and perfect title" at some day *subsequent to its commencement; for* it is the *defiance* of the right of a claimant, the fact of *adverse* possession, which sets the statute running, and not *assurance*, more or less, on the part of such possessor as to the effect of such possession, or of any collateral supervening circumstance, upon the *perfectness* of that title, a defense of which against all comers the law has already ascribed to him because of the character of his possession, and therefore *from the commencement thereof*. (Doe *vs.* Leggatt, 3 Murphy, N. C. 529.)

It is submitted, therefore, that the order of the learned judge upon the proposed *amendments* need not be further considered.]

The defense which is raised by the demurrer is, in general, that the facts stated in the bill show such *laches* upon

the part of the complainants as prevent the intervention of a court of equity for their relief.

And here it is proper to call attention to the circumstance that the facts so stated do not warrant certain argumentative conclusions therefrom which appear to be drawn by the complainants; for instance, certain deeds, the operative language and intention of which are stated, will be seen to have created estates in *fee simple*, and not *for life* as is assumed and made one ground of intervention; and one of these deeds will be seen to have been *delivered*, although a conclusion that it was not is made a like ground of intervention.

The facts admitted by the demurrer appear to be as follows:

The complainants are, and for an undefined period have been, owners of nearly three-fourths of the stock in a corporation—"*The Gold Hill Mining Company*"—created under the laws of the State of New York for the purpose of mining within the State of North Carolina. That company was created upon the 30th day of August, 1853, with a duration of twenty-five years, but, nevertheless, is suggested to have been in some unexplained way in existence (folio 15) at the time of the filing of this bill (March 17, 1882). The plaintiff Taylor is a citizen of Massachusetts, and the plaintiff Howes, who is, and since 1864 has been, a married woman, is a citizen of New Jersey. They sue on behalf of all stockholders who may come in, &c.

Upon the 4th of October, 1853, the four defendants who, acting through Moses L. Holmes, one of their number, had previously agreed to convey to the Gold Hill Mining Company certain mining lands in North Carolina for a consideration of some $300,000, "signed and sealed" a "deed making

the president and directors of the said company the party thereto of the second part and grantees of the said property," conveying said lands, &c., "as set forth in the said deed, now in the possession of your orators, and ready to be produced whenever thereunto required by this honorable court;" which "deed was not then or at any time thereafter duly delivered by the said grantors, but was by them required to be placed in escrow, and to such end deposited with one Burton Craige, Esq., who drew the same, to be thereafter delivered by him to the said grantees on the payment by the company of the said amount of incumbrances," "who thereafter, and upon the payment by the said company of the said amount of incumbrances," &c., instead of [then] delivering the said deed, drew up, as minuted by him in said certificate, a full covenant warranty deed, which was executed by the same grantors of the same tracts of land, mineral interest, and chattels as set forth in the said deed put in escrow, and only for the same expressed considerations, to the said Isaac H. Smith, his successors and assigns, which said deed was dated July 9, 1855, and delivered to the said Smith," in trust to be seized of the premises to the use of the said company, and to convey the same as it should appoint. Smith, who had been president of the company from its origin and so continued until his death, died in 1858 (folio 3), without having made such conveyance or any conveyance to any one (folio 9).

[By comparing what is said in the bill (folio 4) about "incumbrances" in favor of the "original owners" of these lands with allegations farther on (folio 7) upon the same subject, it will be seen that the plan of placing the deed of 1853 *in escrow* was resorted to *as a substitute* for a "condition" to be inserted in the deed. This change of plan as to the form of this security was obviously immaterial, and was besides a convenience *to the grantees*. It follows that the somewhat obscure observations made upon it in the bill (folio 7) are without foundation.]

The company entered upon the lands in question, and bought "divers other tracts of land at or near Gold Hill aforesaid and in Cabarrus county," and prosecuted its business of mining ores and extracting gold therefrom" (folio 10) up to about the 10th of July, 1861 (folio 13), when the

defendants, who knew that in the said deed to Smith "no estate of inheritance was granted, and that after his death, in 1858, they thereby held as remainder men in fee simple all the said property, real and personal, deeded by them to him; and, further, that as the bargainers with the said company in and under said offer and agreement and their said deed of October 4, 1853, were charged with the trust of holding and conveying the same for and to it, they not only refused and neglected so to hold or convey said property, but proceeded to enter upon the same, drive off therefrom its agents and servants by threats and armed violence, and also to seize, occupy, and possess the same, and took the rents, issues, and profits to their own use, and sold a valuable steam-engine, &c., which cost the said company the sum of $9,673.05, and which they seized while *in transitu*, to wit, at Salisbury, in said Rowan county; and further seized and entered on divers other parcels of the real estate and property at or near Gold Hill, and, pretending," &c., made sales of the same and received mortgages thereof; "and, further, that on a foreclosure sale of the said property under one of the said mortgages the said Moses L. and Reuben J. claimed to have been innocent purchasers thereof, and to hold the same by a perfect and indefeasible title, under which the said Moses L. and Reuben J. have negotiated a further sale thereof," &c. (folios 11, 12, 13).

Of the defendants, Moses L. was at one time a "trustee" of the company (see New York law, *post*, p. —), but he ceased to be such about 1855, being succeeded by Reuben J. who continued as such until December 15, 1860, after which time none of the defendants held any office under the company (folios 10 and 11).

After July 10, 1861, the company "became utterly disorganized, never having held any meetings of its directors or stockholders since the year 1862, so that at this time there is but one director of the said corporation now living and surviving, to the knowledge of your orators, and that he, by his acts and doings and connections with the defendants in and touching the pretended claim or claims as above mentioned, adversely to the interests of the said corporation and its stockholders and creditors, has rendered himself incompetent to assert and protect the rights of the said corporation and of your orators, and has refused and neglected and still refuses and neglects so to assert and protect the same" (folios 14, 15).

The complainants excuse themselves from making the surviving trustee a party *because his joinder would oust the jurisdiction of the court, and because of his incompetency as aforesaid,* and also excuse themselves from making the company a party, *because from its place of business it is outside of the jurisdiction, and moreover has no directors or officers competent to represent it* (folios 14, 15).

The defendants, since July 10, 1861, have "debarred the said company, its officers or agents, from the possession, occupancy, and enjoyment of the whole of its said mining and personal property" (folio 16), "and since their taking possession of other parcels of land of said company purchased by and conveyed to it of and by others than the said bargainers, have wholly neglected and refused to reconvey to it the same parcels or any part thereof" (folio 17); and in excuse "in and touching the said first-mentioned deed of October 4, 1853, allege and pretend that they executed a proper deed to the said Gold Hill Mining Company, and had lawful right to require or consent to the placing of said deed in escrow, whereas your orators, besides," &c., "charge the contrary;" and the said defendants (folio 18) further allege and pretend that after the conditions of escrow had been performed they had a "right to execute and deliver, in the stead of the one so placed in escrow, the deed to said Smith," &c., "whereas your orators charge the contrary thereof, and that as a matter of right, the said conditions of escrow having been fulfilled, the said deed of 1853 was wholly relieved therefrom and immediately took effect as a deed to be by them thereafter amended and made a proper deed as aforesaid."

The prayer for relief (folios 26, 27) *is that the defendants "execute a proper deed" of all the lands specified in the deed of October* 4, 1853 (*except, &c.*), *and also for the other lands, to a trustee to be appointed by the court on behalf of all the stockholders and creditors of the company, and that they also render an account; and for further relief.*

The statutes of the State of New York, interesting or important in this case, are as follows:

Revised Statutes, ed. 1852 (vol. 1, p. 1214), provides in

general that any three or more persons wishing to form a company for mining purposes may file with the clerk of the county a certificate in writing, giving the corporate name, &c. (the term of existence not to exceed fifty years), together with the names of trustees (from three to nine), who shall manage its business for the first year, and after the first year these shall be elected annually by the stockholders; and (p. 1216, sec. 4) that all acts of trustees shall be valid and binding as against such company until their successors shall be elected.

Ibid., vol. 1, p. 1173, sec. 9: "Upon the dissolution of any corporation, created or to be created, and unless other persons shall be appointed by the Legislature or by some court of competent authority, the directors and managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation described, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses."

Ibid., vol. 2d, p. 332; act of 1851, ch. 321; (and vol. 3d, ed. 1882, p. 3327): "It shall be lawful for any married woman, being a stockholder or member of any bank, insurance company (other than mutual fire insurance companies), manufacturing company, or other institution incorporated under the laws of this State, to vote at any election for directors or trustees, by proxy or otherwise, in such company of which she may be a stockholder or member."

Coverture is not a *disability* affecting the application of the statute of limitations *in New York*. The only disabilities there of that sort are *infancy*, *insanity*, and *certain kinds of imprisonment* (N. Y. Code of Civ. Proceed., secs. 395, 396). This has been so since the year 1870, [ch. 741, sec. 5].

The statutes of the State of *North Carolina*, supposed to be important here as bearing upon the question of laches, are contained in the "*Revised Code*" (1855). The statutes of that class which are to be found in the later "*Code*" (enacted March 2, 1883) do not apply to any right of action which accrued before August 24, 1868 ("*Code*," sec. 136). Therefore the latter do not apply to the causes of action stated in the bill, which arose at latest upon the commencement of

the *debarring*, in July, 1861; although the statute of limitations did not begin to run thereupon, as appears below, until January 1, 1870. These points have often been recognized by the supreme court of the State, and may be found so recognized in the same case, in Williams *v.* Williams, 70 N. C. Reps., 189 (1874).

Rev. Code, ch. 65, *sec.* 3: "All actions of detinue, trover, replevin, account, * * * and debt upon any contract without specialty, shall be commenced within three years," &c., (*married women* to be allowed (sec. 9) until *three years after discoverture*).

[This statute is quoted because, supposing that the plaintiffs are bound by any statute of limitations that would have bound the Company, if it were in existence and plaintiff here, this provision renders it unnecessary to consider the claims made in the bill because of conversions of *personal property* anterior to three years before it was filed.

Nothing more therefore will herein be said with special reference to the claim to *the steam engine* or any other merely personal property.]

Ib., sec. 19: "The presumption of payment, or abandonment of the right of redemption, of mortgages and of other equitable interests shall arise within ten years after the forfeiture of said mortgage or last payment on the same, or the right of action shall have accrued on any equitable interest or claim, under the like rules as aforesaid."

[It is held in North Carolina that the "presumption" above mentioned is a presumption *of law* arising upon a given state of facts, and that *married women* are bound by it. Walker *vs.* Wright, 2 Jones' Law, 430; Headen *vs.* Womack, 88 N. C., 468. It may, therefore, of course, be appealed to in a fit case, upon *demurrer*.]

"Code" of 1883, sec. 137: "The time between the 20th day of May, 1861, and the 1st day of January, 1870, shall not be counted so as to bar actions, or suits, or to presume satisfaction or abandonment of rights."

Rev. Code, ch. 26, *sec*, 5: "All corporations whose charters shall expire by their own limitation or shall be annulled by forfeiture or otherwise, shall nevertheless be continued bodies corporate for the term of three years after the time when they would have been so dissolved for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to

dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which such corporations may have been established."

Ibid, sec. 6: "When the charter of any corporation shall expire or be annulled, as provided in the preceding section, the court of equity for the county wherein shall have been the actual meetings of the expired corporation, or the court which shall adjudge the forfeiture of charter, on application of any creditor of such corporation, or of any stockholder or member thereof, at any time within the said three years, may appoint one or more persons to be receivers or trustees of and for such corporation to take charge of the estate and effects thereof and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or in the name of such receivers or trustees, all such suits as may be necessary or proper for the purpose aforesaid, and appoint agents under them, and to do all other acts which might be done by said corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation, and the powers of such receivers may be continued beyond the three years and as long as the court shall think necessary for the purposes aforesaid."

[These provisions have been continued in the "Code" of 1883, due effect being given in the latter to an adoption in 1868 of the well-known *Procedure* which amalgamates *law* and *equity*. But inasmuch as this suit was commenced in March, 1882, the language of the original statute only is important, and therefore quoted.]

The general theory of the bill, therefore, is that upon the dissolution of a corporation its creditors and stockholders have a right to make outside persons who had dealt with it, and might then be in possession of property which had belonged to it, parties to a bill filed in order to have a receiver appointed to wind up the affairs of the corporation, and that

under such bill they might obtain the relief of a conveyance by such parties to the receivers, of any property by them wrongfully so possessed: Also, that in order to compel such outside persons to make such conveyance it is not essential that they shall have been in the ordinary sense *trustees* for the company or for its stockholders: It will be enough that they are connected with its affairs only as holders of such property adversely and for many years.

For here it will be observed that, except as to a part of the lands in question, the possession and title of the defendants is said to have commenced by an ordinary trespass committed in the year 1861. Indeed, it will be submitted that this is true, upon the *allegations* of the bill (disregarding its *arguments*) as to *all* the property which it brings into question.

It is submitted that such theory has no foundation in law, and that persons so situated towards the business of a dissolved corporation cannot be made parties defendant to such a bill, with the effect to deprive them of their rights to resist *before a jury* assaults upon their asserted rights of property, or for any purpose. The expression "*trust fund*" employed to denote the property of corporations which have stockholders and creditors is metaphorical, and does not import that third persons who have come into possession of such are, in any proper sense of the term, themselves *trustees* for such creditors or stockholders, and therefore amenable to them in *equity*. (See in this general connection 2 Pomeroy, Eq., sec. 1044, and Knox *v.* Gye, 5 Eng. and Irish App. (L. Reports), 656, quoted there.)

To consider the substance of the bill more clearly, it appears that remedy is sought as regards three different classes of property belonging to the Gold Hill Mining Company, viz:

1. Certain land conveyed in 1853, and again in 1855, to or for the use of the company by the defendants;

2. Other land conveyed to the company about the same time by other persons; and,

3. Certain personal property obtained by the company from other persons than the defendants.

All of this property was seized by the defendants in or about July, 1861, and the company thereafter until now has been by them "debarred" from it.

1. As to the first-mentioned land the bill alleges that, because of defects in the original and substituted deeds of conveyance [(a) that of 1853 upon its face inadvertently conveying only a life estate, and, besides, having never been "duly delivered;" and (b) that of 1855, also inadvertently conveying only a life estate], the defendants as remaindermen in fee at law, are trustees for the company, and therefore liable to a decree for the correction of such conveyance.

2 and 3. As to the other land and the personal property no particular ground of equity is expressly laid in the bill; one contention as to these, as well as to the land first men-

tioned, being probably that, as above suggested, they constitute parts of a *trust fund* for the stockholders and creditors of the company.

As regards the present condition of the Gold Hill Mining Company, it is stated (folio 3) that its charter expired August 30, 1878; but in excusing the complainants for not having made it a party to the bill (filed March 14, 1882,) it is said (folio 15) "that, as far as its place of business fixed by its certificate of incorporation is concerned, it is outside the said jurisdiction, and * * * it has no directors or officers competent to represent the same."

It is submitted in this immediate connection that it appears not important to the contention of the defendants whether at present the company be or be not in existence. Still, it seems that upon the face of the above statement it is to be assumed that it expired upon the 30th of August, 1878; for that fact is expressly stated; and the matter sought to be excused by the somewhat contradictory suggestions further on, is equally well *excused* by the former suggestion, the latter statement, meanwhile, lacking precision and directness for any purpose except the *excuse.*

As regards said company it is also stated (folio 13) that it became "utterly disorganized," and has not had "any meetings of its directors or stockholders since the year 1862;" likewise (folio 14), that there is *but one director surviving, and that he, by his acts and doings and connections with the defendants, has rendered himself incompetent to assert and protect the rights of the said corporation.*

These latter statements, taken in connection with the fact that the complainants, for an undefined period, have held

nearly three-fourths of all the shares of the capital stock of the company" (folio 2), amount to a confession *that the complainants themselves permitted it* to become so disorganized at the time mentioned; and, likewise, that it was *in the due discharge of his official duties* that such surviving director, whether directly or otherwise, did so act as not now to be able to complain of the action of the defendants; for no fraud is imputed to him, and no misconduct excepting what may be implied from his present *incompetency* to represent the contention of the complainants, which *incompetency*, as it may as well arise from *lawful* action upon his part, at a time when there were other directors surviving and concurring, or since he became sole survivor, as from *unlawful* action (a sort of action not imputed, or surmised, by the bill), must, as it seems, be protected by the maxim, *Omnia rite acta*, &c.

Either of these latter allegations has the effect of putting the complainants out of court; for—

a. The former confesses great *laches* nowhere in the bill sought to be excused. (Richards *vs.* Mackall, 124 U. S., 183.) These laches occur on the part of the plaintiffs in their management of a *mining* (91 U. S., 450,) corporation residing in the State of New York. And, even if in any case a court of equity would allow the *coverture* of the *feme* plaintiff to excuse so long an inaction, it would not as regards such inaction *in New York*, where persons of that class, as appears above, are competent to preserve the organization and activity of corporations, and also are not within the *disabilities* incident to the statute of limitations. And it is to be added, moreover, that by making *common*

cause with a plaintiff who is without any pretence of *disability*, a married woman is precluded from appealing to the privilege usually allowed her. Marsteller *vs.* McLean, 7 Cranch, 156; Riden *vs.* Frion, 3 Murphy, 577; Montgomery *vs.* Wynn, 3 Dev. and Batt., 527; Story Eq. Pl., sec. 509;

b. If it be true that the surviving director because of lawful transactions with the defendants is precluded from maintaining this suit, so also must be the plaintiffs, whose equity arises, of course, out of some just cause of complaint which the company, or those who after its expiration represented it, 1 Rev. Stat. N. Y., 1173, above: (all fraudulent conduct by the latter being out of the case,) would have had in respect of the transactions in question. Their "acts and doings and connections," bar all whom they represented, as much as themselves. Wood, Limitations, sec. 208; Perry, Trusts, sec. 858.

Again, it is submitted that the stockholders and creditors of a New York corporation which has expired, are controlled so far as concerns real estate which the company had held within North Carolina, by the terms of whatever general statutory law of the latter State may provide for the winding up of corporations so expired.

In North Carolina the rule of the common law laid down by *Lord Coke*, as to the *return* of real estate held by corporations at their dissolution to the grantors of the same, &c., &c., was affirmed as late as the year 1841, in an opinion of the Supreme Court delivered by GASTON, J., in Fox *vs.*

Horah, 1 Ired. Eq., 358. This opinion was sanctioned as correct so late as 1879, in Von Glahn *vs.* De Rosset, 81 N. C. Rep., 467. In the latter case, the provisions in the *Revised Code*, ch. 26, quoted above, are said to have been occasioned by the opinion in Fox *vs.* Horah, and thereupon it is concluded (quoting Thornton *vs.* Railway Co., 123 Mass., 331, to the same effect) that such *statutory remedy* is "exclusive" of all others, and consequently that no proceedings for the purpose of having a receiver appointed for an *expired* corporation and of collecting its assets, can be had *after three years from such expiration.*

It is not thought necessary to consider the full extent to which the above principles and legislation apply to corporations existing outside of North Carolina, whose interest in property within that State may become subject to administration in courts of the United States. What seems to be according to well established principles, is, that whatever court may be appealed to for such administration, the above three years statutory limitation for commencing the suit will be rigorously applied.

In other words, no such suit as the present could have been brought at any time after August, 1881.

However, if this position shall for any reason be thought to be doubtful, it may be necessary to look more closely into the allegations of fact made by the bill in regard to the land conveyed by the defendants to the company; "allegations of fact"—that is, in contradistinction to *conclusions* therefrom drawn in the bill.

1. As to this part of the land in question, it is submitted that it appears upon the face of the bill that the defendants did (as the bill charges that these now *pretend;* folio 17) convey it to the company *in fee.* In other words, the deed of October 4, 1853, originally placed in escrow, was afterwards actually *delivered*, and did create a fee in the company. If this be true it is, of course, unnecessary to determine what was the effect ofthe deed of July 9, 1855, to *Smith*, the president; but it is submitted that it also, if it had any effect, *conveyed a fee* to him as trustee for the company.

As regards the deed of 1853, the complainants say that the Company was not named as grantee therein, the grantees being *the president and directors of the Gold Hill Mining Company* (folios 6 and 21, and Interrog. 4); and also that although the conditions upon which it had been placed in *escrow* with Mr. Craige were performed, it was not thereupon *duly delivered*, the deed of 1855 to *Smith* being *substituted* therefor; *such former deed, however, being now in the hands of the complainants, ready to be produced, &c.*

As to the *name* of the company, it has been decided in North Carolina, and is believed to be the law everywhere, that the words "President and directors of" prefixed to the charter name of a company in a conveyance, if so intended, *is substantially the name of such company*, and will vest in it property so conveyed. (The President and Directors, &c., *vs.* Norwood, Busbee Eq., 65; Angel and Ames, sect. 90 and n. 4.) Such "intention" *here* is ascribed by the bill, in folio 6, and again in folios 17 and 22.

If this be true, there can be no question that, if executed,

the deed conveyed the estate to *the company;* or, besides, that it so conveyed *a fee.*

As for the *delivery* of such deed, what is alleged, is (folio 8), "that the said deed was not then or at any time thereafter *duly* delivered by the said grantors;" although, as is in the same connection alleged, the condition upon which it had been placed in *escrow* was afterwards fully performed; and also, although the complainants now have it in their possession.

The law of *escrow* in North Carolina is, that upon performance of the condition of escrow, the paper requires no further delivery, but becomes a deed from the original parting with the possession by the grantor, (Hall *vs.* Harris, 5 Ired. Eq., 303). This is believed to be according to the common law everywhere. That *parting with possession* is itself a delivery, except so far as necessary to secure the condition, and, consequently, when the latter has been performed, it is a delivery *without exception*, or, for all purposes. If after that it be detained, the grantees can obtain it by some one of the usual remedies for the detention of valuable articles of personal property.

Moreover, the plaintiffs confess that they (who in this suit represent this company) now have this deed in their possession and control. So that in fact, as well as in law, a delivery has been already made. In this connection it is submitted that if the bill had prayed for a *delivery* of the deed of 1853, its own statements would show such prayer to be for something already done, and impossible to be repeated with any effect.

In contradiction of these allegations stands only the asser-

tion that this deed was not "duly delivered," the only effect of which is to leave the reader in doubt as to what the draughtsman may have meant by "duly."

It is thought that such meaning is not practically important under the circumstances of this case; and also that if the deed of October 4, 1853, was executed, and did convey a fee to the company, it is not important to inquire why the deed to *Smith* was made at all (folio 8).

Some temporary exigency, which the agents of the company thought might so be avoided, would have been a good reason therefor in point of *corporate* policy; but unless the former deed *to the president and directors* had been destroyed, that reason is of no importance here; for instance, a doubt may have been suggested whether *a New York Company* could securely hold land *in North Carolina*, and some then unfinished scheme for avoiding that difficulty may have been in progress. This explanation is suggested by the circumstance that amongst the North Carolina acts of 1855 (*Acts*, ch. 148, p. 139) is an enabling statute *rechartering* the New York *Gold Hill Mining Company*, and empowering it to hold land in the former State. Pending that scheme this provisional arrangement may have been resorted too.

However, it is submitted that the defendants here are not interested to explain the existence of the deed to *Smith*, which, after its execution, appears in some way to have lost interest with the company.

It is now further submitted that such deed of 1855, if at all effective, *having been made to the president of the company and his successors, in trust for such company, and to make conveyances thereunder as it should direct* (folios 8, 9), implies

that the *trust* therein was *in fee;* and therefore conveyed a fee to the trustee. (Neilson *vs.* Lagow, 12 How., 98; *Perry*, Trusts, sec. 315.)

Proceeding still further to consider that portion of the *land*, which was originally bargained to the company by the defendants, and assuming, for argument's sake, that what has already been herein submitted in their defense, is of no avail, and that they are indeed *trustees*, in respect of the alleged mistake in wording their conveyances,—attention is now called to the North Carolina statute above cited by which all equitable rights of action are *presumed* to be satisfied or abandoned after *ten years*. This presumption, as already said, is a presumption *of law*, which, so far as it binds *The Gold Hill Mining Company*, binds also the complainants; the *feme* complainant taking no benefit from her coverture, as would indeed have been true under this statute (see above) even if she had sued in her own right, without being involved as a *co-plaintiff*, or as *stockholder*.

The statute of presumptions, after the action of the defendants in and ever since July, 1861, debarring the company from possession, began to operate (after its *suspension* as above), upon the 1st day of January, 1870, so that more than twelve years had elapsed under that statute before the filing of this bill.

Upon the whole matter, therefore, in regard to the land which the defendants bargained to the company, it is submitted that such bargain was afterwards completed by valid conveyances in fee, and that thereafter the defendants became as much strangers to that land as they were to any other property held by the company.

Also, that the complainants have asserted no equity upon their part to relieve them from the effect of those "doings" by the surviving trustee, which they say prevent him from bringing such a suit.

However, if their situation be otherwise and as in the bill argued, the complainants are barred by laches:

1. *Under general equitable principles,* 124 U. S., 183.

2. *In allowing the company to be disorganized for nineteen years before this suit was brought.*

3. *In disregarding the North Carolina three years' statutory limitation for commencing suit to collect and apply the assets of the expired corporation; and also,*

4. *Under the above North Carolina statute of presumptions.*

2. As regards the lands other than those bargained to the company by the defendants, which were taken possession of and held by the latter at the same time and in the same way as the bargained lands:

The description of these lands is so very *vague* that, if otherwise relief could have been granted in respect of them, it must have failed upon this account.

The only ground for coming into equity for these lands is supposed to be that they make part of a *trust fund* for stockholders and creditors of the company. In other words, they are lands which the company *might* have sued for *at law* at any time since the war that the courts have been open in North Carolina—that is, at any time since April 2, 1866 (The Protector, 12 Wall., 700); whilst, under the statutes of that State (*above*) it *ought* to have sued for them at some time between January 1, 1870, and August 30, 1878, when it expired:

It is submitted therefore that, inasmuch as during that period the plaintiffs, as holders of three-fourths of its stock, were in effect *the company*, it is against important principles often enforced by this Court of late, that by the aid of their own laches the plaintiffs should succeed in transferring questions of fact as to property, from determination by a jury to that by a court. The bill shows not only an absence of *specific* allegations of endeavor to obtain action by the company during its existence, and indeed an absence of any allegations to that end of any sort; but even a confession of gross laches. (Equity Rule, 94; Hayward *vs.* Andrews, 106 U. S., 672; New York Co. *vs.* Memphis Co., 107 U. S., 205.)

This observation is the more pertinent in the case if it be thought that the company is still in existence, for in that case it is virtually party to this action within the meaning of Rule 94, just cited.

If the present bill be competent, it is supposed that in further administering this case the Court would have power incidentally to displace the defendants (as "trustees" of a trust fund) from their adverse possession, without trial by jury. It may be doubted whether a court of equity would

assert such jurisdiction in winding up an expired corporation. And here the propriety of the provisions of the North Carolina statute in that case, above quoted, will again be recognized, contemplating, as they do, *subsequent suits* at law or in equity by the receiver, in his own name or in that of the company.

That statute, therefore, carefully recognizes the right of third persons to a trial by jury of issues of fact arising upon the claim of the corporation or its subsequent representatives.

Perhaps the treatment of *expired* corporations, whether domestic or foreign, may be regarded as so much a part of the police powers of that State within which a question thereupon legitimately arises, that courts of the United States will be disposed to give more than ordinary effect to one like this of North Carolina.

It is to be added that the *specific* prayer of the bill, that the defendants *execute a deed* for all of the land mentioned, to some trustee by this Court to be appointed, seems quite *romantic* as to that land which this company had obtained from others than the defendants; and therefore as to all the land, if it be true that the defendants had already made valid conveyance of the land which they once did so bargain. It would indeed be a curious circumstance if after all these years of their *adverse* possession and dealing with these lands since 1861, the defendants can be taken up short by a court of equity in 1882, and made to execute deeds therefor to the very claimants whom they had been so long defying,—upon an allegation of a mistake in drafting committed in 1853 or 1855.

In conclusion, it is also submitted that if the principal part of the specific prayer in this bill, which is for a conveyance, is to be denied, no other relief, under the general prayer for relief, can be devised which is consistent with such specific prayer and the allegations of the bill. (Hayward *vs.* Bank, 96 U. S., 611.)

S. F. PHILLIPS,
For the Defendants.

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vs.

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REPLY BRIEF FOR PLAINTIFFS.

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Respondents.

Reply Brief for the Appellants.

The counsel for the appellants, in presenting this his reply brief to the Court, desires to reiterate, as was said upon the argument, that his main hope of success with this Court has been and is upon the *merits* of the case (even though imperfectly presented by the bill) rather than upon any technical points, or answers to the technical points raised by the counsel for the defendants.

His proposition to the Court is this: That in 1853 the defendants in this suit, as the owners of land in North

Carolina, now sought to be recovered by the proceedings in this suit, sold, or attempted to sell, *for a consideration of two hundred and ninety-nine thousand five hundred dollars*, to a corporation of which these plaintiffs represent three-fourths of the stock, the lands now sought to be recovered; that for those lands they were fully paid the aforesaid sum; *that the deed which it is here sought to have corrected was manifestly imperfect upon its face;* that for the years which elapsed up to July 10, 1861, after the engrossing of this deed and the receipt of the purchase price, not only were these defendants stockholders in the corporation in common with the plaintiffs, thus sustaining a fiduciary capacity toward them, but they were also (not all of them at the same time, perhaps, but some one of them at all times) directors and superintendents of that corporation; that in other words they, who had received the full payment for the lands they thus agreed to sell, were not merely by their fiduciary relations partners (so to speak) with these plaintiffs, but were also in a representative and, in fact, controlling relation and capacity towards these plaintiffs, as directors and superintendents of this corporation, The Gold Hill Mining Company; that the trust placed in them, not merely in their representative and controlling capacity, but, as it would appear, *personally*, was such that as appears by the bill (folio 11, page 4), the stockholders of this company, upon the mere representation of the defendants, submitted to and paid an extra assessment amounting to the sum of twenty thousand dollars, which was paid over to these defendants and placed in their pockets upon their simple representation.

It is upon these peculiarly intimate and fiduciary relations between the parties that the counsel for the plaintiffs most strongly relies for the equitable interference of this Court.

The learned counsel for the defendants, upon his argument before the Court, did not appear to rely very strongly upon the refusal of the Court below to allow the amendments offered by the appellants (the plaintiffs below), and

the counsel for the appellants, without going deeply into the question as to whether the discretion of the Court below in this particular is reviewable here, though he believes it so to be, feels that this is quite an unimportant matter in view of the other arguments presented; that, in point of fact, the rule of the Court, as laid down in 1823, in the case of Wormley *against* Wormley, 8th Wheaton, 421–451, is still the rule of this Court in such cases:

"This Court will not suffer its jurisdiction to be ousted by the mere joinder or the nonjoinder of formal parties, but will rather proceed without them and decide upon the merits of the case between the parties who have the real interests before it, whenever it can be done without prejudice to the rights of others."

As will be said below in this brief, this argument applies peculiarly to this case, because the same parties who sold the land in 1853 now claim to be the owners of it and are all before the Court.

The most remarkable contention on the part of the counsel for the defendants as contained in his brief, is to be found on page 4 of the same, and it is reiterated upon page 17 in which he undertakes to claim before the Court that the deeds by which it is alleged in the bill the defendants conveyed but imperfect titles in 1853 and 1855, were actually complete deeds and did convey fees.

The design of the counsel in this connection is but too evident, namely, to take this case from the equitable interference of the Court to correct and enforce an agreement improperly expressed in 1853, and thus place the plaintiffs at the mercy of those statutes of limitation and rules of law prevailing in the State of North Carolina, which now afford them no redress. But it is confidently submitted to the Court that upon the record the contention of the counsel for the defendants cannot be sustained.

There were two deeds, the deed dated October 4, 1853, which was never delivered, which the plaintiffs herein now seek to have corrected, and the subsequent deed of July 9, 1855, which was actually delivered and recorded.

Concerning the first deed, the bill, on page 3, folio 7,

contains the following language: "While it purported to convey the said property by these expressed words 'absolutely in fee simple,' did in fact convey the same without any or proper words of inheritance or of power of assignment, and while it contained a covenant of warranty of title, contained no covenant of a clear title, and did not express the condition in the said offer and agreement that the tenure thereunder was subject to the encumbrances to the extent of $125,000, as provided in said offer."

Concerning the second deed, the bill on page 4, folio 9, contains the statement that its *habendum* clause also contained the words following: "In trust nevertheless that the said party of the second part shall stand seized and possessed of the premises hereby conveyed to the only proper use and behoof of the Gold Hill Mining Company, a body politic, organized and chartered by the acts of the Legislature of New York, and in trust to apply all the incomes and profits of said premises to the use of the said Gold Hill Mining Company, and convey the same to whomsoever the said Gold Hill Mining Company may designate and appoint."

Inasmuch as this is an appeal from a decree sustaining a demurrer, in which the only record before the Court is the bill itself, no opportunity having been offered to introduce in evidence the original deed, it is submitted that for the purposes of the present discussion, the conclusion of the Court as to what the deed really did effect must be confined to the allegations of the bill, that the defendants having elected to try the issues here before the Court without permitting the plaintiffs to introduce the evidence which the bill alleges they have at their command, are concluded by the language of the bill.

In this connection it must be remembered that after exhaustive argument below his Honor, Judge Dick, was entirely in accord with this contention. In his opinion (see p. 3) he says of the first deed: "This deed was in some respects imperfect and did not convey a fee simple title for the want of proper words of limitation to convey a fee." And of the second deed he says (also on page 3): "This

deed was defective in not containing appropriate words of limitation to convey a fee as contemplated by the parties to the contract of sale."

It was contended for the plaintiffs upon the argument that, even though the Court was not convinced that an absolute case was made out in the way of excuse for the plaintiffs on the various grounds of coverture, Statute of Limitations, excuse for *laches*, &c.. yet, if upon the whole the Court were of the opinion that the plaintiffs, who certainly were in a doubtful position during all the years for which *laches* is alleged, during which the Legislature of North Carolina passed and repassed various statutes of relief, had presented a good case for relief, and had shown the *bona fides* of their claim, the Court would relieve the plaintiffs upon the whole case as presented, even though upon any one ground or several grounds they had failed to show an absolute or statutory excuse.

Counsel for the defendants urged that coverture is not a disability in the State of New York, but that is no reason why the plaintiff Howes cannot plead it here. It is alleged on her behalf, not as an *inability to act* in New York, but *as an absolute disability to sue* in North Carolina. And when it is considered that her only relief, the relief sought here, is to correct a deed, and obtain possession of land in North Carolina, the fact that she is absolutely debarred by the laws of North Carolina, as was presented upon the argument and shown on the appellant's brief, seems to render the counsel's argument as to her *status in New York* entirely off the question.

In this connection, it is advisable to consider the point raised by the defendants concerning the North Carolina Statute of Presumptions, which counsel asserts on page 9 of his brief, is a presumption of law arising upon a given state of facts, and that married women are bound by it. Counsel neglected to state that, even in North Carolina, this presumption is not an absolute presumption, and the case he quotes, Headen *vs.* Womack, 88 North Carolina, 468, does not establish the rule that married women are

bound by it except under a state of facts not existing in this case.

In Headen *v.* Womack, 88 N. C., 468, the Court uses the following language in its opinion, p. 470: "Like the presumption of payment arising upon a bond under the Act of 1826, that of the abandonment of a claim may become and does become, when the facts of the case are admitted, a conclusion of law from *facts* to be applied by the Court and not left to the discretion of the jury. So likewise is it a question of law for the Court what circumstances, if true, are sufficient to repel the inference created by the lapse of time under the statute."

And indeed in the case above quoted the plaintiffs had *abandoned* their claim by removing the house they had built upon the premises and the first owner had thereafter sold to an innocent purchaser for value.

It was contended for the defendants that, even if the plaintiff Howes was protected under the North Carolina Statutes of Coverture as the excuse for her apparent laches, she was concluded by having made common cause with the plaintiff, who is without any pretense of disability (page 14 of Defendants' Brief).

The case of Marsteller *vs.* McLean, 7 Cranch., 156, which is quoted by counsel in support of this position, appears to have turned upon an entirely different question. In that case the plaintiffs were co-parceners. Their estate was joint. The *right of one to sue* was the *right of all.* One having failed, it was held the others must fail. But in this case the estate of the plaintiffs is not joint; they are simply holders of stock in the same corporation.

The counsel for the defendants admitted upon the argument that no statute of limitations ran before 1861, nor until January 1, 1870. It is respectfully submitted that the war not being practically ended until 1866, on the date of the President's proclamation, and the plaintiff having gone under the disability of coverture in 1864, according to the provisions of the Code of North Carolina, as laid down in Point III. of the plaintiffs' brief, no statute of

limitations has run against her at all, *even by the law of North Carolina.*

See sec. 137 Code of Civ. Pro. of N. C.
Sec. 149 Code of Civ. Pro. of N. C., and State *ex rel.* Lippard *v.* Trautman, 72 N.C., 551, quoted in plaintiffs' original brief.

The contention of counsel that the first deed conveyed a fee seems to be sufficiently answered by the fact that less than two years afterwards the grantors themselves executed a second deed of the same property and had the same recorded. And his contentien on page 18 of his brief that the first deed was delivered because the plaintiffs now have it in their possession, seems to be a *non sequitur* when it is considered that the plaintiffs are mere *stockholders in the corporation* to which the deed was to be given and *which the defendants controlled.*

Counsel for the defendants objected on the argument to the use of the words "trust fund," as characterizing this estate. It is submitted that upon the authorities it is a trust fund in view of the relations of the parties, and that equity will so regard it. Yet any other word will do as well, if the *fiduciary* relations of the parties be borne in mind.

The contention of the counsel that what he terms the "lawful acts" of Amos Howes must bind these plaintiffs seems somewhat remarkable, when it is remembered that as the bill alleges (folio 15), his interests are hostile to that of these plaintiffs. In other words, it is claimed for the appellant that the lawful acts of Amos Howes do not bind these plaintiffs any more than the acts of these defendants, who were his co-directors.

A point is made in the defendants' brief that the bill seeks to acquire lands not mentioned in the deed of 1853, and of certain personal property obtained by the company from other persons than the defendants (page 12 of defendant's brief). It is submitted to the Court that, even if the Court consider that the plaintiffs have no right to the lands not owned by the defendants in 1853, it is still possible that

the defendants may be called to account for lands which they have taken from the company in disregard of their representative capacity. And so far as the personal property is concerned which the bill alleges they took from the company without process of law, it is submitted that under the case of Allore *vs.* Jewell, 94 U. S., 506, the amounts thus alleged to be received by them might well be considered by the Court in answer to any allegation of hardship on their part to be called upon to deliver up the lands they had held so long, with the enjoyment of their *mesne* profits.

The Court below was entirely with the plaintiffs upon what counsel has considered the strongest ground for their relief before this Court. Judge Dick in his opinion (page 5), says: "There could scarcely be a clearer case for a Court of Equity, if applied to by proper parties in proper time and in proper manner to interfere and furnish adequate relief by exercising its powers of correction of written instruments and specifically enforcing contracts for the sale of land. The contracts were in writing within the provisions of the Statute of Frauds. They were certain and fair in all their parts. They were founded upon valuable and adequate considerations paid and received by the respective parties. The officers of the corporation were put in possession of the premises and expended large sums of money in buildings, repairs and improvements. The vendors were capable and could easily perform the agreements of the contracts, and the errors in the deeds were caused by the mutual mistake of the parties. Nearly all the elements which constitute the equity for correction of specific performances are to be found in this transaction."

Why, then, did his Honor below decide against the plaintiffs? Upon page 14 of his opinion is to be found the following:

"As such corporation was agent and representative of the stockholders who were entitled to rights and interests by and through the corporation, I am inclined to think that the stockholders were also barred and the coverture

of the feme plaintiff did not prevent the bar as to her rights.

Wellborne *vs.* Finley, 7 Jones, 228.
2 Perry on Trustees, sec. 858.
Herndon *vs.* Pratt, 6 Jones Eq., 327.
Kerrison *vs.* Stewart, 3 Otto, 155."

In other words, his Honor thought that, because The Gold Hill Mining Company could not sue these defendants after 1877, in North Carolina, being barred at that time by the Statute of Limitations, therefore these plaintiffs could not sue. It is submitted on two grounds that this decision is wrong:

FIRST.—That the stockholders of a corporation, under such circumstances, may have better rights than their defaulting officers.

SECOND.—The more especially so, as we have in this case on the one side the original stockholders of this company, and on the other no third parties, no innocent purchasers, but the original holders of the lands sought to be recovered, stockholders in the company themselves, and the faithless directors of the company to whom these stockholders had to look. A consideration of the authorities quoted by Judge Dick will bear out the contention of counsel here that, except it can be shown that the parties from whom the lands are sought to be recovered were in the position of innocent purchasers, or entire outsiders toward the parties who seek relief, his position cannot hold; that the *fiduciary relations* of the parties bring them within the view and control of this Court in this case, in utter disregard because above and beyond the local statutes of North Carolina and the cases quoted.

In concluding this brief, counsel for the appellants desires to agaim reiterate what he said upon the argument, that so long as he can convince the Court of the solid equities in favor of these plaintiffs, that they have practically *a*

good case in the sense of an honest one requiring relief, this Court will disregard, in the exercise of its equitable jurisdiction, any formal or technical objection such as want of parties. That if he has been able to convince the Court that these parties deserve relief, equity will give them that relief, in spite of North Carolina Statutes of Limitation.

Gaston ~~Ginton~~ *v.* Carroll, 101 U. S., 426.

In this view of the case counsel feels it not at all necessary to elaborate the point raised upon the argument by his Honor, Mr. Justice Miller, which is a technical point, and one possibly capable of explanation. It is his hope that the Court will feel able to give the relief asked on the other and the higher ground advanced by counsel in the argument and now urged upon the Court.

And in this connection it is respectfully submitted that one point not heretofore urged may well be considered by the Court in granting the relief now asked for, and that is the *poverty* of these plaintiffs. It seems to be the fact that these defendants have obtained *all* the means of these plaintiffs, and that they (the plaintiffs) have been, ever since the first transaction, and now are, poor. True, poverty is not a *ground* of relief, yet it may well explain *apparent* laches since 1870, in view of the other circumstances of their case. It is not much that they now ask. It is merely that the Court will give them the opportunity to put the defendants to their answer, so that their case may be tried upon its merits, *not upon technicalities.* Quite possibly the Court might call upon them to more clearly define the allegations of their bill. So far as their delay is concerned in applying for the relief, *apart from the confliction of legal opinion* (supposing they had sufficient means after 1853 to obtain it), which must have necessarily been caused by the various legislation from time to time which North Carolina has put in operation since the war, the Court should remember this poverty of these plaintiffs. They represent three-fourths of the stockholders of a corporation which has paid to these defend-

ants $299,500, and an additional assessment of $20,000. It is fair to presume that these payments exhausted their means, *and, so far as poverty can be an excuse in such cases*, it is urged upon the attention of the Court.

One thing is certainly most certain, if this Court will not help them, *no other tribunal can.*

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Of Counsel for Appellants.

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